United States Court of Appeals

for the Second Circuit

APPENDIX

75-2103

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES ex rel. NICHOLAS ABATE, :

Petitioner-Appellee, :

-against- :

BENJAMIN MALCOLM, COMMISSIONER OF CORRECTIONS, WARDEN, RIKERS ISLAND PRISON, DISTRICT ATTORNEY OF QUEENS COUNTY, :

Respondents-Appellants. :

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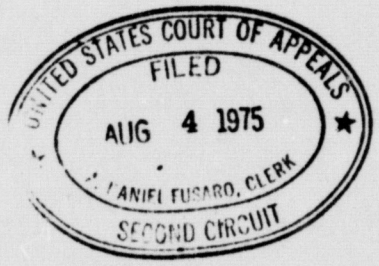
B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. NICHOLAS ABATE,

Petitioner-Appellee,

-against-

BENJAMIN MALCOLM, COMMISSIONER OF CORRECTIONS, WARDEN, RIKERS ISLAND PRISON, DISTRICT ATTORNEY OF QUEENS COUNTY,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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75-2103

B 38

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and seventy-five

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United States ex rel. Nicholas Abate,

Petitioner-Appellee,

v.

Benjamin Malcolm, Commissioner of Corrections, Warden, Rikers Island, Prison, District Attorney of Queens County,

Respondents-Appellants.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

by ~~notice of motion dated~~ by order to show cause dated July 24, 1975 to stay the order of the United States District Court for the Eastern District of New York pending determination of the appeal

be and it hereby is granted ~~denied~~

It is further ordered that this appeal be placed on the calendar for argument during the week of August 11th, 1975, appellant's record and brief to be filed on or before August 4, 1975, and respondent's on or before August 7, 1975

Ellsworth Van Graafeiland

Circuit Judges

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : Indictment Number 1482/72

JOHN DOE a/k/a
NICHOLAS ABATE, :

Petitioner. :

----------X

STATE OF NEW YORK)
:ss.:
COUNTY OF QUEENS)

Joseph DeFelice, being duly sworn, deposes and says that:

1. I am an Assistant District Attorney of Queens County, attorney of record for the People of the State of New York and duly admitted to practice before this court.

2. This affidavit and the accompanying Memorandum of Law are submitted in opposition to petitioner's request for a stay pending appeal.

3. Petitioner was indicted, by the Queens County Grand Jury, under Indictment Number 1482/72, for the crimes of criminal possession of stolen property in the first degree and bribery in the second degree.

4. Respondent was acquitted on the bribery charge but a guilty verdict was rendered on the charge of criminal possession of

Exhibit B

stolen property, a class D felony, and petitioner was sentenced to a period of one year imprisonment by the Hon. Albert Buschmann on May 16, 1975.

5. A motion to suppress evidence was denied, after a hearing, on April 16, 1973, by the Hon. Joseph J. Kunzeman.

6. On May 30, 1975, the Hon. Henry J. Latham denied petitioner's motion for a stay of execution pending appeal with no opinion. Subsequently, on June 17, 1975, Justice Latham also denied petitioner's request for reargument.

7. An application for a stay was then made to the Hon. Jacob Fuchsberg, Judge of the New York Court of Appeals. Upon this application the People contended that the Court of Appeals was without jurisdiction since Criminal Procedure Law §460.50 (2) (a) specifically limits the request for a stay of execution from a judgment of The Supreme Court to:

> (1) a justice of the Appellate Division of the department in which the judgment was entered, or:
>
> (2) a judge of The Supreme Court of the judicial district embracing the county in which the judgment was entered.

Moreover, it was noted that Criminal Procedure Law §460.50 (3) also limits the request for a stay to "not more than one application". Further it should also be noted that, there is no provision authorizing the appeal of an application for a stay. Judge Fuchsberg denied petitioner's application.

8. On July 15, 1975, Judge Thomas Platt of the United States District Court for the Eastern District of New York issued an order granting petitioner's application for a writ of habeas corpus with the proviso that the enforcement of the writ would be stayed for fifteen days and the writ would be dissolved if, the state court either declared that the writ's denial was based upon the conviction and the trial record and in accordance with §510.30 of N.Y. Criminal Procedure Law or upon a hearing on the motion by petitioner, the state court either "grants reasonable bail or supports its denial with such a statement or with findings of facts that would enable a reviewing court to determine whether or not such denial was arbitrary".

9. Upon information and belief, during the proceedings at the trial court level, a bench warrant was issued and respondent forfeited his originally posted bail of $3,500. Petitioner was subsequently brought to court by agents of the bail bonding company. This affiant has spoken to Assistant District Attorney Randy Eng, who was handling the case at that time. It is his recollection that the bench warrant was properly issued. However, due to a clerical error, the bench warrant, which was ordered stayed, was executed immediately.

10. Upon information and belief, petitioner failed to appear in court on June 16, 1975, for surrender and that on June 17, 1975, the Hon. Bernard Dubin found it necessary to issue a bench warrant for defendant. Defendant appeared later that day.

11. As to petitioner's contention that the seizure of the truck and its contents was illegal, it is submitted that, under the facts, the police investigatory powers justified the presence of the officers ("inside a constitutionally protected area") [Coolidge v New Hampshire, 403 U.S. 443, 466 (1971)] and that the seizure was made of items which fell within "plain view" of the officers [Harris v New York, 390 U.S. 234 (1968)].

12. Defendant also contends that the acquittal on the charge of bribery, which crime, he alleges, served as part of the circumstantial proof of defendant's knowledge that the goods were stolen, requires a reversal of the conviction for criminal possession as an inconsistent verdict.

However, it is clear that each count of an indictment is to be treated as if it were a separate charge and consistency of verdicts is unnecessary. Dunn v U.S., 284 U.S. 390 (1932); People v Pugh, 36 AD 2d 845 (2d Dept., 1971), aff'd 29 NY 2d 909 (1972), cert. denied 406 U.S. 921 (1972). Further, the verdict is not repugnant since the two crimes charged did not contain identical elements. People v Bullis, 30 AD 2d 470 (4th Dept., 1968); People v Blandford, 37 AD 1003 (3d Dept., 1971); People v Williams, 47 AD 2d 262 (2d Dept., 1975) and U.S. v Periz, 256 F. Supp. 805 (S. D. N.Y. 1966).

As to the question of knowledge of possession, it should be noted that the trial record indicates that petitioner was actually seen handling the stolen items.

13. As to petitioner's contention that the jury panel did not satisfy the requirements of Taylor v Louisiana, 95 S Ct 692 (1975), it is submitted that the bare assertion that only one woman was seated in the jury panel does not indicate that the procedures utilized in Queens County violated the directives of Taylor. Furthermore, there has been no ruling specifically declaring the jury selection in Queens County as unconstitutional, and such issue should be decided upon appeal and not here. In fact, as of February, 1975, Queens County was complying with the Taylor decision. [The jury that convicted petitioner, however, was selected under the old law].

Even if Taylor presents a viable issue for appeal, petitioner failure to state any other error would render any Taylor violation harmless beyond a reasonable doubt. Chapman v California, 386 U. S. 18 (1967) and People v Crimmins, 36 NY 2d 230 (1975).

14. It is further submitted that petitioner's request for a stay was founded upon a rational basis in view of the above mentioned facts. The test to be followed is the likelihood of possible reversal [Criminal Procedure Law §510.30 (6)] and the facts here do not warrant such a determination. Finally, the court is directed to McKinney's Commentary to Criminal Procedure Law §510.30 by Judge Denzer which states:

> The theory of this provision manifestly is that once a conviction occurs the defendant is in a vastly different position than before; and that a judge who is utterly convinced that the judgment will stand is under no obligation to defer execution of the sentence merely because he believes that the appellant will later be available to serve it.

15. Petitioner has also been convicted of two previous felonies, to wit: robbery in 1939 and assault in 1943.

16. It should further be noted that petitioner never sought a preference pursuant to §670.21 of the N.Y. Code of Rules and Regulations. Moreover,no brief was filed for the September Term of the Appellate Division, Second Department [briefs were due July 11, 1975] and no brief or motion for preference has yet been filed for the October Term.

17. In addition, petitioner did not file the trial record with the Appellate Division on his initial application or on his application for reargument, and also did not file the record when he applied for a stay before Judge Fuchsberg.

18. The petitioner has obtained an order to show cause from the Appellate Division, Second Department, subsequent to Judge Platt's decision and order. This order is returnable in the Appellate Division on Monday, July 28.

19. The District Attorney wishes to inform this Court that our office has filed a Notice of Appeal (hereto annexed as an exhibit) in the United States District Court, Eastern District of New York, from a decision rendered by the Hon. Thomas C. Platt.

granting to the petitioner a writ if habeas corpus. Our office has further moved in the United States Court of Appeals, Second Circuit for a stay of Judge Platt's order, pending appeal (a copy is also hereto annexed as an exhibit).

If this Court take any action pursuant to Judge Platt's order and memorandum pending our application for a stay in the United States Court of Appeals, our right of appeal to the Federal Appellate might be rendered moot, (no case or controversy).

Furthermore, should the United States Court of Appeals grant our stay, this Court under C.P.L. 460.50 would not have jurisdiction since C.P.L. 460.50 provides only for one stay.

WHEREFORE, this Affirmation is respectfully submitted for this Court's consideration.

Joseph DeFelice

Dated: Kew Gardens, New York
July 25, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES ex rel NICHOLAS ABATE, :

Petitioner-Relator, : 75C 1087

-against- : NOTICE OF APPEAL

BENJAMIN MALCOM, Commissioner of Corrections; WARDEN, Rikers Island Prison, :

Respondents. :

----------X

S I R:

PLEASE TAKE NOTICE that the District Attorney of Queens County, attorney of record for the People of the State of New York, hereby appeals to the United States Court of Appeals, Second Circuit from an order of the Hon. Thomas C. Platt, dated July 15, 1975, and a Supplemental Order dated July 22, 1975, granting a writ of Habeas Corpus to the petitioner and from each and every part of said order as well as from the whole thereof.

Dated: Kew Gardens, New York
July 24, 1975

Yours, etc.

TO:
Hon. Lewis Orgel
Clerk of the United States
District Court, Eastern District
of New York
Cadman Plaza East
Brooklyn, New York

NICHOLAS FERRARO
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Paul Chevigny, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Exhibit C

(5)

~~Duffy~~

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES ex rel NICHOLAS ABATE,

Petitioner-Relator,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents.

- -x

75 C 1087

SUPPLEMENTAL MEMORANDUM

July 22, 1975

PLATT, D.J.

Following the release of this Court's Memorandum and Order dated July 15, 1975, the Queens County District Attorney's office verbally requested that the Court consider a reargument or a stay pending appeal on the ground that this Court's decision contravened the Second Circuit Court of Appeals decision in Wallace, et al. v. Kern, et al., F.2d (Slip Op. No. 1128 Decided June 30, 1975) which had not theretofore been called to the Court's attention.

At the time of its decision this Court was aware of the Wallace decision but had not assumed that it had any applicability to the decision which it reached herein. After further consideration the Court adheres to its original view.

All that this Court decided was that due process required the Appellate Division to have considered the pre-trial and trial records and give a written statement of the

Exhibit D

reasons for its denial. See "Morrissey v. Brewer, 408 U.S. 471 (1972) and its progeny". (Slip Op. p. 4551).

Under ordinary circumstances the Court would have presumed that the former had been done and that the Appellate Division's denial had been based upon such records. A doubt on this score was created, however, by the papers submitted to it and the Court merely resubmitted the matter to resolve the doubt.

Under the circumstances, this Court adheres to its original decision herein.

Thomas C. Platt

U.S.D.J.

(b)

m 22024

Appeals

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES ex rel NICHOLAS ABATE,

Petitioner-Relator,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents.

- -x

75 C 1087

MEMORANDUM AND ORDER

July 15, 1975

PLATT, D.J.

By an order to show cause, a petition and an affidavit verified by his attorney, petitioner-relator seeks a writ of habeas corpus releasing him on bail during the pendency of his appeal from a conviction of possession of stolen property after trial by jury on April 1, 1975, before The Honorable Albert H. Buschmann who sentenced him on May 16, 1975 to a term of one year.

On May 22, 1975, petitioner filed a Notice of Appeal and by order to show cause signed by Mr. Justice James D. Hopkins of the Appellate Division, Second Department, moved for bail pending appeal which motion was denied by Mr. Justice Henry J. Latham on May 30, 1975, without any opinion or reason given for such denial.

The petitioner moved to re-argue and such motion was denied again without opinion on June 17, 1975. Thereafter, petitioner made application to Judge Fuchsberg of the New York Court of Appeals and again his application was denied without opinion.

PPI—SS—3-17-72—30M—9153

Exhibit E

The Assistant District Attorney states in his opposing papers that:

> "***[D]uring the proceedings at the trial court level petitioner forfeited his originally posted bail of $3500. He was subsequently brought to Court by agents of thebail bonding company. Petitioner has contended in papers submitted to the Appellate Division, Second Department, that his failure to appear was due to a clerical error. However, this fact is not substantiated in any papers which have previously been submitted.
>
> "***Petitioner failed to appear in Court on June 16, 1975, for surrender and that on June 17, 1975 the Honorable Bernard Dubin found it necessary to issue a bench warrant for defendant. Although petitioner did eventually willingly surrender, this failure to appear coupled with the earlier failure * * * are factors which this Court should consider in making its determination."

The Assistant District Attorney on the oral argument also claimed that the petitioner had a prior record but as it turns out such record consists of two State Court convictions for offenses which occurred some 30 years ago.

Petitioner states that he is a 60 year old man who lives with his family in Queens County, owns his own business and has had three major operations in the past two years and is now in the hospital at Rikers Island where he was placed upon his surrender to serve his sentence on June 17, 1975.

Petitioner claims further that since his arrest on the present charges, he made more than 50 court appearances and at the time of his trial and sentence was free on his own

recognizance.

Petitioner further claims that there are good grounds for his appeal in that his conviction arose out of an illegal arrest, search and seizure in violation of his Fourth Amendment rights and in that despite his challenge to the jury panel (on which there was only one woman) both prior to and at the outset of his trial under Taylor v. Louisiana, U.S. , 95 S.Ct. 692; 42 L.Ed. 2d 690 (January 21, 1975), and under Chapter 21 of the New York Laws of 1975, effective March 18, 1975) his challenge was denied.

Finally, petitioner argues that his sentence was for a term of only one year, that the Appellate Division will not hear argument on his appeal until the September or October Term, and that by the time of the Appellate Division's decision on such appeal he will have in all probability served the greater part, if not all, of his sentence.

In reply the Assistant District Attorney states that the time for the filing of petitioner's brief on appeal to be heard in the September Term has already expired and that petitioner has not requested a preference for his appeal.

This Court is extremely reluctant to interfere with State Court decisions and procedures but finds this case to be an extremely troublesome one.

FPI—SS—3-17-72—30M—0153

Neither party furnished the Court with the record of the pre-trial suppression hearing or the record of the trial itself. Furthermore, it is not entirely clear whether either or both such records were furnished to Mr. Justice Henry J. Latham or Judge Jacob Fuchsberg. Petitioner argues, for example, that "the People in its opposition to petitioner's motion for bail, conceded that it had not read the record of the trial; thus it was not depending on the record to seek petitioner's immediate remand. In none of the its subsequent papers, did the prosecutor rely on the trial record to oppose bail; instead, he simply stated his conclusion that the appeal was 'without merits'" (Resp. Br. pp 3 and 4).

Moreover, had Mr. Justice Latham in his order denying petitioner's application given his reasons therefor, defendant might well have been satisfied or alternatively the Court might be in a better position to understand the action taken.

Based upon the papers before this Court at this time, however, petitioner appears to have good arguments for presentation to the Appellate Division on his appeal.

Under these circumstances, this Court feels that the decision in United States ex rel. Keating v. Bensinger, 322 F.Supp. 784 (N.D. Ill., E.D. 1971), is applicable herein. There the Court made the following pertinent comments (322 F.Supp. 787-788):

FPI—SS—3-17-72—30M—9153

"Absent any findings in support of the denial of bond, it is impossible to ascertain whether or not such denial was arbitrary or discriminatory. Respondents urge in effect that the denial of bail without findings or reasons if proper and since, absent such findings, the petitioner has been unable to demonstrate that the denial of bail was arbitrary, the petition should be denied. If they are correct, the guaranty of the Eighth and Fourteenth Amendments against arbitrariness by a state court in the setting of bail authorized by the state legislature could be reduced to a nullity by the mere silence of the court denying bail. If a court may deny bail with no reason, hardly any set of circumstances can be imagined wherein it could be determined by a reviewing court that the denial was arbitrary or discriminatory. Respondents do not dispute this but urge that such is and should be the law. We do not agree that the right to a reasonable setting of bail may, in effect, be repealed by any court by its mere failure to provide reasons for its action that can be examined by a reviewing court. We conclude, therefore, that the failure of the Appellate Court to state any reasons for its decision was in itself an arbitrary action in relation to petitioner's motion for bail pending appeal.

"We explicitly note that we are not holding that no justifiable reasons may exist for the denial of bail to petitioner. We conclude only that the state court's failure to provide any basis for its decision to deny bail creates a presumption of arbitrariness. We are not holding that an eighteen year old convicted of the sale of marijuana, who has been sentenced to a term of ten to twenty years, and who has no prior felony convictions has an absolute constitutional right to bail pending appeal. Our conclusion is merely that, when a state court denies bail authorized by the state legislature without providing any supporting reasons, the failure to indicate the motivating reasons for the denial of bail is in and of itself an arbitrary action that violates the Eight and Fourteenth Amendments. Any other rule would effectively nullify the protection of those Amendments.

"As we have concluded that petitioner's Eighth and Fourteenth Amendment rights were violated by the state court's denial of bail without any supporting reasons, we grant his writ of habeas corpus. However,

FTI—SS—3-17-72—30M—9153

as we have not ruled that petitioner has a constitutional right to bail but merely that his procedural rights guaranteed by the constitution have been violated, we feel obliged to allow the state an opportunity to correct this deficiency. Therefore, we will stay the enforcement of the writ for fifteen days and authorize its dissolution if the state court, within that period and upon the motion of petitioner, provides a hearing on the bail issue, and either grants reasonable bail or supports its denial with findings of fact that would enable a reviewing court to determine whether or not such denial was arbitrary."

It should be noted, however, that another Judge in the same court at a later date has questioned the aforestated presumption of arbitrariness in the case of United States ex rel. Kane v. Bensinger, 350 F.Supp. 181 (N.D. Ill., E.D. 1972). While this modification might weigh against this Court's granting the writ and fixing bail on condition that the defendant prosecute his appeal promptly, it should not, in this Court's view, affect the granting of similar relief to that accorded in the Keating case, supra, given all of the above stated facts in the case at bar.

Accordingly, this Court grants petitioner's writ of habeas corpus but will stay the enforcement of the writ for fifteen days and authorize its dissolution if the state court, within that period either states that its denial was based upon the conviction and the trial record and in accordance with the provisions of Section 510.30 of the New York Criminal Procedure Law (e.g., "that the appeal is palpably without merit"), or upon the motion of petitioner, provides a hearing on the bail issue, and either grants reasonable bail or supports its

FPI—SS—3-17-72—30M—9153

denial with such a statement or with findings of fact that would enable a reviewing court to determine whether or not such denial was arbitrary.

SO ORDERED.

Thomas C. Platt
U.S.D.J.

(7)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

U. S. ex. rel. NICHOLAS ABATE, :

Petitioner-Relator, :

-against- : 75C 1087

BENJAMIN MALCOM, COMMISSIONER OF CORRECTIONS; WARDEN, RIKER'S ISLAND PRISON, :

Respondents. :

----------X

PEOPLE'S MEMORANDUM OF LAW

The facts of this case are related in the accompanying affidavit submitted in opposition to petitioner's request for a Writ of Habeas Corpus.

Petitioner alleges that the denial of bail, pending appeal, was in violation of his rights under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Respondent contends that the State Courts did not act in an arbitrary or capricious fashion and there is a rational basis for the decision denying bail. Moreover, it is argued that petitioner has not exhausted his State remedies.

Exhibit F

POINT ONE

Petitioner has failed to exhaust all State remedies.

Federal Courts have jurisdiction to issue a writ of Habeas Corpus in certain cases in which the detention is under state authority. The Federal Courts will not, unless in unusual circumstances, interfere with the regular course of procedure under state authority by issuing a writ of Habeas Corpus [United States ex. rel. Kennedy v Tyler, 269 U.S. 12 (1925)]. In the case of a person held under state authority, orderly judicial administration requires that before a federal court is served with a petition for writ of Habeas Corpus, recourse should be made to whatever judicial bodies of the state are still abailable. Mooney v Holohan, 55 S. Ct 340.

A Federal Court generally will not issue the writ until the judicial remedies afforded by the state, including the remedy by appeal on constitutional issues, have been exhausted. United States ex. rel. Kennedy v Tyler, supra.

In the case at bar, the petitioner has argued that he is unable to take an appeal since the next term of the Appellate Division is not until September, 1975. Nevertheless, §670.21 of the New York Code of Rules and Regulations specifically allows for a preference in Criminal cases. Petitioner has not asked for such a preference. Moreover, petitioner has also failed

to file a brief for the September term [appellant's briefs must be filed by July 11, 1975].

Thus, petitioner has failed to exhaust his state remedies by asking for a preference and this writ should therefore be denied. This becomes especially glaring when it is realized that although petitioner complains of being unable to argue his appeal until September, he has reluctantly failed to file a brief for the September term. Therefore, his request for a writ of Habeas Corpus may well be classified as simply dilatory.

POINT TWO

The denial of the application for a stay was not an abuse of discretion and there is a rational basis for the decision.

It is clear that the burden is on the convicted defendant to show that the State Court has acted in an arbitrary fashion. Petitioner thus has the burden of showing that the record provides no rational basis for the decision. U.S.ex. rel. Walker v. Twomey, 484 F 2d 874 (7th Cir. 1973). Furthermore, it is well established by both the New York State and Federal Constitutions that there exists no absolute right to bail. People v. Melville, 62 Mis. 2d 366 (1970); New York State Constitution, Art. I,§5; U.S.C.A. Const. Amend 8.

New York State, through the Court of Appeals, has taken the position that the right to bail is a matter of legislative discretion. People ex rel. Klein v. Krueger, 25 NY 2d 497 (1969); People ex rel. Shapiro v. Keeper of City Prision, 290 N.Y. 393 (1943).

It is respectfully submitted that the denial of petitioner's request for a stay was not an abuse of discretion and was founded on a rational basis.

Although there was no reasons given for the denial of the stay by either Judge Latham or Judge Fuchsberg, it is clear that the failure of the State Courts to so articulate does not authorize the federal courts to impose their procedural requirements [which are more liberal and favor release] upon the state courts. U.S. ex rel. Walker v Twomey, 484 F 2d 874,876 (7th Cir. 1973). In this regard, the Federal Courts have stated that "reliance on a presumption of regularity is appropriate". Johnson v Zerbst, 304 U.S. 458, 468 (1938) and U.S. ex rel. Walker v Twomey, supra. As was stated in U.S. ex rel. Cameron v New York, 383 F. Supp. 182, 184 (E.D.N.Y. 1974):

> ...Not every abuse of discretion is such that it consists of either a total failure to consider an application as required by law or rendering a decision on a ground which infringes on otherwise constitutionally protected areas, e.g., race, religion, that the federal court must intercede and secure due process of law.

Thus, as in Cameron, supra, the petitioner is seeking a review of a discretionary decision. "If such a review is desirable, it is for the New York Legislature, and not this Court, to provide therefor". U.S. ex rel. Cameron v New York, supra at 184. See Hamilton v State of New Mexico, 479 F 2d 343 (10th Cir. 1973).

Despite the allegations raised by petitioner, he has two previous felony convictions to wit: a robbery in 1939 and an assault in 1943 in addition to the felony conviction in the case at bar. Moreover, the trial record indicates that the police actually saw petitioner handling the stolen property [the stolen property involved was 3800 gallons of coca-cola syrup and a trailer -truck].

POINT THREE

THERE IS NO MERIT TO PETITIONER'S APPEAL.

It is respectfully submitted that petitioner's appeal is without merit for the following reasons:

(a) As to his contention that the seizure of the truck and its contents was illegal, it is submitted that under the facts, the police investigatory powers justified the presence of the officer (inside a constitutionally protected area") [Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)] and that the seizure was made of items which fell within "plain view"

of the officers [Harris v. New York, 390 U.S. 234 (1968)].

(b) Petitioner also contends that the acquittal on the charge of bribery, which crime served as part of the circumstantial proof of petitioner's knowledge that the goods were stolen, requires a reversal of the conviction for criminal possession of stolen property in the first degree as an inconsistent verdict.

However, it is clear that each count of an indictment is to be treated as if it were a separate charge and consistency of verdicts is unnecessary. Dunn v. United States, 284 U.S. 390 (1932); People v. Pugh, 36 A D 2d 845 (2nd Dept., 1971), aff'd 29 N.Y. 2d 909 (1972), cert. denied 406 U.S. 921 (1972). Further, the verdict is not repugnant since the two crimes charged did not contain identical elements. People v. Bullis, 30 A D 2d 470 (4th Dept., 1968); People v. Blandford, 37 A D 2d 1003 (3d Dept., 1971) and People v. Williams, ____ A D 2d ____(2d Dept., decided April 21, 1975). See also, United States v. Perdiz, 256 F.Supp. 805 (S.D.N.Y. 1966).

(c) As to petitioner's contention that the jury panel did not satisfy the requirements of Taylor v. Louisiana, 95 S.Ct. 692 (1975), it is submitted that petitioner fails to state sufficient allegations to constitute a question of fact [see People v. Session, 34 N.Y. 2d 254 (1974)] and the bare assertion that only one woman was seated in the jury panel does not indicate that the procedures utilized in Queens County violated the directives of Taylor, supra. Furthermore, there

has been no ruling specifically declaring the jury selection in Queens County as unconstitutional, and such issue should be decided on appeal and not here. In fact, as of February, 1975, Queens County was complying with the Taylor decision. [The jury that convicted petitioner, however, was selected under the old law.]

Even if this Court should consider Taylor as presenting an important issue in this case, petitioner's failure to state any other error would render any Taylor violation harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967) and People v. Crimmins, 36 N.Y. 2d 230 (1975).

Thus, any appeal by petitioner will be without merit and the denial of his request for a stay was, therefore, founded upon a rational basis. The test to be followed is the likelihood of possible reversal [Criminal Procedure Law §510.30(6)] and the facts do not warrant such a determination.

Finally, the Court is directed to the commentary to Criminal Procedure Law §510.30 (McKinney's) where Judge Denzer states:

> The theory of this provision manifestly is that once a conviction occurs the defendant is in a vastly different position than before; andthat a judge who is utterly convinced that the judgment will stand is under

no obligation to defer execution of the sentence merely because he believes that the appellant will later be available to serve it.

CONCLUSION

PETITIONER'S MOTION SHOULD BE DENIED.

Respectfully submitted,

NICHOLAS FERRARO
District Attorney
Queens County

Joseph DeFelice
Assistant District Attorney
of Counsel

July, 1975

75C 1087

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES EX. REL. NICHOLAS ABATE, :

Petitioner-Relator, :

-against- :

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison, : ORDER TO SHOW CAUSE

Respondents :

----------x

Upon the petition of SIDNEY ZION, sworn to on the 7th day of July, 1975 and upon all papers and proceedings heretofore had herein, let the respondents show cause, in Room 7 of the United States District Court, Eastern District of New York located at 225 Cadman Plaza East, Brooklyn, New York, on the 11 day of July at 11:30 AM or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not be granted herein and why the petitioner should not have such other and further relief as may be just, proper and equitable, and it is further

ORDERED, that sufficient reason appearing therefor, let service of a copy of this order, together with the papers upon which it was granted, upon the offices of the respondents and upon the Office of the District Attorney of Queens County on or before the 10 day of July at ~~5:00 PM~~ noon be deemed sufficient service on all respondents.

DATED: New York, New York
July 9 1975
at 3:05 P.M.

/s/ Thomas C. Platt
U.S.D.J.

EXHIBIT-G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES EX. REL NICHOLAS ABATE, :

Petitioner-Relator, :

-against- : PETITION FOR WRIT OF HABEAS CORPUS

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison, :

Respondents. :

----------x

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

The petition of Sidney Zion respectfully shows:

1. This petition is made by counsel and not by the named petitioner, because Nicholas Abate is at present incarcerated in Rikers' Island Prison.

2. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and restrained of his liberty, and is now in the custody of respondents.

3. Petitioner Nicholas Abate was tried in the Supreme Court of New York Queens County, on Indictment #1482/72 for the crimes of possession of stolen property in the first degree and bribery in the second degree. He was convicted of possession of stolen property and acquitted of bribery, after trial by jury, on April 1, 1975.

4. Petitioner was sentenced by Hon. Albert Bushman on May 16, 1975 to a term of one year. A notice of appeal was filed on May 22, 1975. An order to show cause why petitioner should not be admitted to bail was signed by Justice Hopkins of the Appellate Division, Second Department on May 22, 1975. The motion for bail pending appeal was denied by Justice Latham on May 30, 1975. No reason was given, nor opinion written. A copy

of the order is attached. A motion to reargue was denied on June 17, 1975. A judge of the New York Court of Appeals, Jacob Fuchsberg, denied an application for bail pending appeal on June 25, 1975. The ground given by Judge Fuchsberg was that a judge of the Court of Appeals had no jurisdiction to review the decision of the Justice of the Appellate Division. Petitioner had surrendered to serve his sentence on June 17, 1975.

UNCONSTITUTIONALITY
OF DETENTION

5. The New York statute concerning bail pending appeal, CPL §460.50, provides for one application to one justice either of the Supreme Court or its Appellate Division. No appeal is provided for by statute.

6. No reason for the denial of bail to petitioner was given by Justice Latham, whose order simply read "denial". He declined to hear oral argument on the application for reargument, and did not hear argument on the original application.

7. The reasons for granting bail were and are now compelling. Among them are the following.

8. The substantive grounds for appeal are strong. Petitioner was tried after the decision in Taylor v. Louisiana, ____ U.S. ____, 42 L.Ed. 2d 690 (1975) concerning the exclusion and automatic exemption of women from the jury. Counsel made timely application to strike the panel under that case, but the trial justice refused to apply Taylor even prospectively. On information and belief, on March 21, 1975, when the trial began, Queens was the only county in New York City which had not complied with the decision in Taylor and thus flouted the U.S. Supreme Court. There was only one woman on the panel. On information and belief, the system was changed in Queens on April 1, 1975, the day petitioner was convicted.

9. There is a substantial search and seizure issue

which was detailed in a memorandum of law submitted to Justice Latham, attached hereto (said memorandum also discussed the issue concerning Taylor v. Louisiana).

10. Petitioner's sentence is short. Because it is a year, and because of summer recess for the appeals courts, it is likely that he will remain in prison for his entire sentence or a substantial part thereof if bail is not granted.

11. Petitioner is sixty years old, and lives with his family in Queens County. He owns a business, a pizza parlor, now run by his family. He has had three major operations in the past two years, and is now in the hospital at Rikers' Island. Petitioner made more that fifty court appearances, and at the time of his trial and sentence was free on his own recognizance.

12. Petitioner has been deprived of due process and equal protection of the laws by the above arbitrary and capricious denial of bail pending appeal, which will in effect render his substantial appeal grounds negatory.

EXHAUSTION OF REMEDIES

13. State law provides for only one application for bail pending appeal. That application has been made. An application was further made to Judge Fuchsberg on the ground that he had inherent power to correct an abuse of discretion. [Judge Fuchsberg, without signing an order stated orally that CPL §460.50 deprived him of jurisdiction to review Justice Latham's order.]

14. No previous application for the relief sought herein has been made to this court. WHEREFORE, petitioner prays that writ of habeas corpus issue and that reasonable bail be set perding appeal.

SIDNEY ZION

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SIDNEY ZION, being duly sworn, deposes and says, that he is the counsel for petitioner herein, that he has read the foregoing petition, and the same is true to his own knowledge, except insofar as it is alleged on information and belief, and as to these parts, he believes them to be true.

Sidney Zion

SIDNEY ZION

Sworn to before me this
7 day of July, 1975

PAUL GOODMAN
NOTARY PUBLIC, State of New York
No. 41-1305355 - Queens County
Cert. filed in County
Comm Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES EX. REL. NICHOLAS ABATE,

Petitioner-Relator,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents.

----------X

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

PAUL J. GOODMAN, being duly sworn, deposes and says:

1. I am the attorney for the petitioner herein for the purpose of obtaining the relief requested in the Order to Show Cause. The application is being submitted by PAUL G. CHEVIGNY, an attorney admitted to the Bar of this Court.

2. This application is made by Order to Show Cause and not by motion because the petitioner is in Rikers Island Prison and time is of the essence in bringing this matter before this honorable Court.

3. Deponent believes that the petitioner is an excellent bail risk. I am informed by his trial attorney that he made more than 50 Court appearances and at the time of his trial and sentence, he was free on his own recognizance. I am further advised that he has always been ready to execute the orders of the Court and has appeared in response to the mandates of the Court including voluntary surrender to the authorities when his applications in the State Courts were denied. As stated in the petition of SIDNEY ZION, attached hereto and made a part hereof, petitioner should be released on bail pending the determination of his appeal. Any reasonable bail that this Court shall fix would be fair and just under the circumstances so that he may process his legal rights and not be incarcerated, rendering his appeal academic.

4. No previous application has been made to this Court for the relief requested herein.

PAUL J. GOODMAN

Sworn to before me this

9 day of July, 1975.

Notary Public

ANNA MICA
NOTARY PUBLIC, State of New York
No. 30-7924925
Qualified in Nassau County
Commission Expires March 30, 1976

Credited to account of
within named payee
Absence of
endorsement guaranteed
CHEMICAL BANK
107-36 71st AVENUE
FOREST HILLS, NEW YORK 11375

MEMORANDUM OF LAW

INTRODUCTION

It is settled law that on an application for a stay pending the determination of an appeal, the defendant need not prove reversable error. Justice Shapiro perhaps said it best in People v. Lowry, 347 N.Y.S. 2d 964, 966 (1973): "It is not necessary on an application such as this to determine that the learned Trial Justice committed any prejudicial error in the trial or that the judgment of conviction will necessarily be reversed, but merely that there are arguable questions which should be determined on appeal before the defendants are compelled to serve the penalty of final incarceration". See also People v. Surrentelw, 325 N.Y.S. 2d 31 (1971), where Justice Fein granted bail pending appeal to a defendant who had pleaded guilty, although he had previously denied the defendant's motion to suppress.

Moreover, as Professor Denner states in his Practice Commentary, CPL 460.50, the new Criminal Procedure Law shifts the emphasis from the "stay" aspect of the previous Criminal Code (Sections 527, 529, 753) to the question of bail. Thus, "a reasonable possibility of reversal on appeal - comparable to a reasonable possibility of acquittal in pre-judgment situations - is merely one factor, and doubtless not the most important one, to be considered on the bail application".

Even a determination that the appeal is palpably without merit does not require a denial of the application, though it would emphasize it under Section 510.30, writes Professor Denner. Or, as Justice Fein put it in People v. Surrentelw, supra: "Even if I believed the appeal

to be without merit, there would still be a manifest danger of injustice to the defendant if I were to deny his application." (at page 33)

This, said Justice Fein, was because all or a substantial portion of the sentence might be served before the Appellate Division had an opportunity to review the case. To deny the application, "would seriously water down or even make completely meaningless in any real sense defendant's right to appeal". People v. Surretsky, at p. 34.

Thus, Justice Fein concluded (ibid): "Where possible, a defendant should not be compelled to serve a prison sentence where there is any question whether the conviction may be reversed for error at the trial level."

We submit that the defendant, NICHOLAS ABATE, stands foursquare within the principles announced above, and is, therefore, entitled to be free pending the determination of his appeal. Indeed, we go further; we respectfully urge the Court that his appeal has extraordinary merit of Constitutional dimension. We have indicated a number of substantial appeals grounds in the original petition to grant a stay. Since this Memorandum is submitted upon Reargument, we wish to emphasize and expand upon two of those points: Search and Seizure, and the automatic exemption of women from jury service.

I. Search and Seizure.

The testimony of the two police officers involved in the case, while sometimes contradictory and inconsistent, was clear on one point, both at the suppression hearing and the trial. That is, they agreed that while driving in their police car, they received a radio run to "investigate truck" at a certain street corner in Queens on the evening of

February 1, 1972, at approximately 9:20 P.M. When they reached that corner they saw no truck. They proceeded a few blocks and saw a trailer backed nearly flush into a store. There was no truck attached to the trailer. They alighted from the police car, and one officer said he immediately noticed someone removing something from the trailer. This person turned out to be on Boyd, subsequently acquitted of criminal possession at trial before the Court, sitting with no jury.

Both officers pulled their guns and rushed into the store, which turned out to be a storehouse holding various and sundry items, including an old refrigerator. The officers separated the two men found inside, one taking Boyd, the other Abate.

Officer Horndlhofer testified that upon taking Abate aside, Abate offered him a bribe. "Take the money out of my pocket and leave me go", Abate allegedly said. The officer then said he warned Abate that bribery was a felony, "whereupon the suspect removed a roll of money from his pocket and handed it to me". After reading Abate the Miranda warnings, the officer placed him under arrest for bribery.

According to the testimony of both officers, neither Abate nor Boyd made any incriminating statements, on the spot or at the police station. (With the exception, of course, of Abate's alleged statement regarding the "bribe").

Both officers testified that they did not know until several hours later the identity of the owners of the trailer and vats, which contained Coca-Cola syrup. They agreed that at the time of arrest there was nothing about the trailer or the contents to indicate that they were stolen property.

Is it not at least "arguable" that the police entry into those premises, leased by the defendant Abato, was unlawful and unconstitutional? The entry, it must be recalled, was based on an alleged radio run to investigate a truck, which turned out not to be in the vicinity; and in any event, the "run" was to the wrong place. Even assuming that this radio run actually occurred (the prosecution did not substantiate it by records during the trial or hearing), can such a vague, incorrect instruction in any way be deemed "probable cause" to enter a premises without a warrant? If the answer is in the affirmative, we submit that the probable cause requirement of the Fourth Amendment is without meaning.

In this connection, it is instructive to compare Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959), where FBI agents, investigating a theft from an interstate shipment of whiskey at a nearby terminal, followed the car of Henry, who was "suspected of some implication in some interstate shipments". On two occasions, Henry and a companion were observed picking up cartons at a residence. The agents stopped Henry's car, heard him tell his companion to make a false statement about just joining Henry, and observed that the cartons were addressed to an out-of-state company.

The Court held that the agents had arrested without probable cause and that the seizure was unconstitutional. Said the Court: "Riding in the car, parking in an alley, picking up packages, driving away--these were all acts that were outwardly innocent.....The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure".

Next to the case at bar, Henry was a veritable Mater

gate investigation; can it be said, in this light, that Abate's attack on the entry and seizure are "plainly without merit"?

And what of Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)? In that case, an informant had said that an individual named "Blackie Toy", the proprietor of a laundry on Leavenworth Street, had sold an ounce of heroin; there were several Chinese laundries on this street, and apparently more than one Toy. The arrest of one of them was held unlawful because there was no showing that the officers "had some information of some kind which had narrowed the scope of their search to this particular Toy".

Since the entry into "this particular Toy's" premises was unconstitutional, and thus held to taint, as "fruit of the poisonous tree", subsequent evidence discovered as a result of the illegal entry, can Abate's assertion that the entry and seizure was unlawful be considered so outside the realm of reason as to require his immediate incarceration?

Again, in the case at bar there were no informants, no previous suspicion, no anything except cruising policemen spotting something different from what they had allegedly been after, and elsewhere to boot; is this, at best, any more than the con's "educated sniffer?" Yet, unromantic as it may be, the Fourth Amendment demands more; if not, then we submit that mere suspicion has supplanted probable cause.

In upholding the seizure of the trailer and its contents, Justice Kunzeman asserted that it came within the "plain view" exception to the Warrant Clause. The seizure, he said, was "not based on the arrest;" instead, it was justified because the evidence "fell into their (the officers') view".

But the "plain view" doctrine depends not only on an otherwise "lawful search", but quite clearly on a warranted search. See Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564, (1971), cited, ironically, by the People in it's opposition to this application. In the context of a broad-ranged discussion of the doctrine, the Court, per Stewart, J., indicated that the seizure of unnamed items was sometimes permissable.

"An example of the applicability of the 'plain view' doctrine", said the Court, "is the situation in which the police have a warrant to search a given area for specific objects, and in the course of the search come across some other article of incriminating character". Permitting seizure of that article does not conflict with the warrant requirements, as the police do have a warrant and (for there to be a valid plain view) have limited their search to the areas authorized by the warrant.

If Coolidge in any way fits the prosecution's case here, it eludes us; to the contrary, it supports Blair's contention that the seizure was unconstitutional. See, for example, Modern Criminal Procedure, West Publishing Co., 1974, where Professors Kamisar, LaFave and Israel comment (p. 245): "Of course, the mere fact that an item is found in plain view while a search warrant naming other items is being executed does not justify seizure of that item. As noted in Coolidge, it must be an 'article of incriminating character'."

Needless to say, the trailer and its contents were not, in themselves, of "an incriminating character"; indeed, the police officers testified that they did not know they were stolen until several hours after the arrests and seizure. See Commonwealth v. Welch, 359 Mass. 623, 246

N. E. 2d 645 (1971) where unnamed stolen property was suppressed because police did not have probable cause to believe the articles were stolen at the time they seized them.

While specifically excluding the arrest as the basis for a "search incident", Justice Kunzeman justified the police entry into the premises on a "totality of the circumstances", including the "bribery". By the "totality of the circumstances", we can only conclude that he was alluding to such matters as the fact that it was nighttime, that there was an alleged radio run to the vicinity, etc. We have dealt with the radio run; as to the time of day, it surely cannot be said that "suspicion raids" are permissable because of darkness. It is quite the other way, given the specificity requirements of night warrants. In any event, there is nothing inherently illegal or even suspicious about unloading a trailor into a storehouse at night.

In any event, the judge's reference to the bribery may well go to the linchpin of this case; it was the "bribe" offer that seemed to exonerate everything else here. And yet the jury, after hearing the defendant not only deny the bribe but charge that Officer Herndlofer stole some $4,000.00 from him, acquitted Abate on the bribery indictment.

The verdict obviously raises the most serious questions about Herndlhofer's character and ability to serve the city. Otherwise, it challenges his credibility in the most fundamental way, raising every conceivable question as to his testimony regarding circumstances surrounding the arrest and seizure. It also, and not just incidentally, opens grave issues regarding Abate's allegation, in the original application herein, of "compromise verdict".

But perhaps most important, Abate's exoneration on the bribery count undercuts the heart of the People's case. Without the false bribery charge, there could have been no reason whatever for the police to arrest Abate and seize, sans warrant, the trailer and its contents. Of course, even if the bribery was substantiated by the verdict, it would not justify the seizure; without it, there is no scintilla of probable cause available to justify the events that subsequently occurred.

We could say much more, but we respectfully submit that on this application we have gone substantially beyond what is required under CPL 460.50 and the case law and Commentary supporting it. If ever an appeal roared with "arguable" issues, we believe this is it.

2. The Automatic Exemption of Women from Jury Service.

Taylor v. Louisiana, 95 S. Ct. 692 (1975) holds that women as a class may not be excluded from juries or given automatic exemption based solely on sex. On the first day of trial, both before and after the jury panel appeared in the courtroom, Abate moved to dismiss the indictment and the panel (only one woman appeared) and the array, based on Taylor, which was decided on January 21, 1975, or some two months before the trial began. The Trial Judge denied all the motions and granted Abate an exception on the record. The denial raises the most fundamental constitutional issue and is in itself more than ample grounds for this Court to grant a stay pending appeal.

On information and belief, Queens County was the last county in New York City to deny automatic exemption to women from serving on juries. By the time the trial began, every other county had changed its rules, in accordance with Taylor and the new legislative mandate. Queens,

however, did not begin the jury selection until April 1st, the day the jury returned it's verdict in People v. White. Again, on information and belief, some judges in Queens County continued jury trials until the automatic exemption for women was repealed.

We understand that there is a view current among some members of the Bar and the Judiciary in New York that the Taylor case is inapplicable here (despite the quick change in the State based on the ruling) because the Louisiana statute struck down by the Supreme Court differed from New York's in that it excluded women unless they previously filed written declaration of their desire to serve on juries. Since New York did not require this, but simply gave automatic exemption to all women who checked off their sex on the jury mailings, it is urged by some that the case does not apply to this State.

Even a cursory reading of the opinion of the Court must disabuse all of this notion. As the Court said, per White, J." "....We think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male". (. 701). The method of "automatic exemption" is absolutely irrelevant; for anyone to stand on so thin a read, as the People apparently do in opposing this application, comes uncomfortably close to cynicism, particularly in the context of C.L. 510.50 and it's requirement of no more than "arguable merit".

The venire here was all-male save one woman, who was in due course dismissed by the People, albeit for cause. There can be no doubt that the juries in this County have been male, well beyond their population majority (if any). At the trial, the Justice stated that he had

"been denying" all motions under Taylor, and thus made it crystal clear that any hearing would be futile. In the event, as was said above, he denied the motions and granted the exceptions. The indication, to counsel for Abate, was that the Trial Justice clearly expected the issue to be decided on appeal.

We respectfully urge that this ground is of elemental constitutional dimension, and that the defendant ought thus to be permitted to have it determined while free, so as not to make "completely meaningless in any real sense (his) right to appeal". People v. Burretsky, supra. p. 34.

9 In conclusion, we reiterate all grounds presented in the original application herein. And we add, in light of the bail emphasis of the new Criminal Procedure Law, that the defendant has never missed a court appearance in the three-plus years since his arrest and indictment; that he has a family, a business and deep roots in the community; that there is no indication whatever that he would jump bail pending appeal, and to the contrary, every proof that he will not do so.

We, therefore, urge the Court to grant the defendant a stay pending determination of his appeal.

Respectfully submitted,

[redacted] ESQS.
Attorneys for Defendant
71-33 Austin Street
Forest Hills, New York 11375

Sidney Zion, Esq., of counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES EX. REL. NICHOLAS ABATE,

Petitioner-Relator,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; Warden, Rikers Island Prison,

Respondents.

----------X

MEMORANDUM OF LAW

Exhibit H

PRIEST & CARSON
71-23 AUSTIN STREET
FOREST HILLS, N. Y.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAU CORPUS

INTRODUCTION

Petitioner is incarcerated in Rikers Island Prison under a one year sentence for criminal possession of stolen property. He was remanded on June 17, 1975 after bail pending appeal was denied by Justice Henry Latham of the Appellate Division, Second Department. Justice Latham gave no reasons for his denial of petitioner's motion for bail pending appeal, which motion was duly brought under the New York Criminal Procedure Law, Section 460.50. The denial exhausted state remedies, although petitioner attempted to secure his freedom by application to the New York Court of Appeals, on the grounds that inherent jurisdiction to reverse an arbitrary denial of bail rested in that Court. However, Judge Jacob Fuchsberg declined to intervene on the sole ground that Section 460.50 deprived the Court of Appeals of jurisdiction.

Petitioner, in his motion for bail pending appeal, asserted substantial errors at trial of Constitutional dimension; these included, inter alia, serious search and seizure issues as well as the repeated refusal of the trial court, after timely application, to give prospective force to the so-called "women juror" case, Taylor v. Louisiana, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). (See Memorandum of Law presented to Justice Latham below, which is attached hereto and made a part hereof) Petitioner contended that these issues, on their face, went far beyond the requirements and standards set by the New York statutes and case law for bail pending appeal, which demand(at most) that "arguable questions" be raised before execution of the penalty of final incarceration. CPL 460.50, 510.30,

530.50, 710.70. See also, People v. Marony, 347 N.Y.S. 2d 964 (1973); People v. Surretsky, 325 N.Y.S. 2d 31 (1971).

Given the shortness of the sentence, it was, and is, obvious that petitioner would serve all or substantially all of his time before the issues could be heard and determined on appeal. Despite all of these facts, and even though petitioner had proven himself to be a perfect bail risk over a three year period, Justice Latham inexplicably denied the motion.

The question at bar, then, is clearcut: Was the denial of bail, pending appeal, a violation of petitioner's rights under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

We respectfully contend that it was a flagrant violation of these fundamental rights and we urge the Court to issue the writ of habeas corpus and thus free the defendant on reasonable bail pending appeal.

1. Jurisdiction.

Where, as here, state remedies have been exhausted, the Federal District Court has jurisdiction to issue a writ of habeas corpus pursuant to 28 U.S.C. 2254(a) and 2241(s)(3), when based on allegations that petitioner is in custody in violation of the United States Constitution.

Although the United States Constitution does not, in and of itself, require the States to provide for bail pending appeal, it is well settled that once a state has made provision for such bail, the arbitrary denial of it violates the Fourteenth Amendment. U. S. ex rel. Walker v.

here discussion of NY Div

Twomey, 484 F. 2d 874, 875 (7th Cir. 1973). In reiteration of this principle, the Court in this District lastyear stated: "By providing a procedure for the fixing of bail pending appeal, the New York Legislature obligated the New York courts to administer it fairly. An arbitrary denial of a right created by a State legislature is a denial of due process". U. S. ex rel. Cameron V. People of the State of New York, 383 F. Supp. 182 (E. D. N. Y. 1974)

2. The Failure of the State Court to Provide Any Basis For Its Refusal to Grant Bail Pending Appeal Is In Itself A Violation of Petitioner's Constitutional Rights.

In U. S. ex rel. Keating v. Bensinger, 322 F. Supp. 784, 787 (D. C. Ill. 1971) the Court held: "When a state court denies bail (pending appeal) authorized by the state legislature without providing any supporting reasons, the failure to indicate the motivating reasons for the denial of bail is in and of itself an arbitrary action that violates the Eighth and Fourteenth Amendments".

While subsequent decisions held that the trial record could support a denial of bail sans reasons by the state court, U. S. ex rel. Kane v. Bensinger, 359 F. Supp. 181 (D.C. Ill 1972), U. S. ex rel. Walker v. Twomey, supra, or, similarly the seriousness of the crimes and the length of the sentence, U. S. ex rel. Smith v. Twomey, 456 F. 2d 736 (7th Cr. 1973), none of these qualifications of the Keating doctrine apply here. Indeed, the People in its opposition to petitioner's motion for bail, conceded that it had not read the record of the trial; thus, it was not depending on the record to seek petitioner's immediate remand. In none of its subsequent papers, did the prosecutor rely on the trial record to

oppose bail; instead, he simply stated his conclusion that the appeal was "without merit".

In the Smith case, supra, the Court of Appeals upheld the denial of bail pending appeal, sans supporting reasons by the state court, on the grounds that the seriousness of the crimes - rape, armed robbery, aggravated assault - and the length of the sentence (20-40 years) provided a "rational basis" for denial of the bail.

But the opposite exists in the case at bar: a one year sentence imposed for the conviction of a non-violent, relatively minor, crime. This is a far cry from Kane, a convicted heroin dealer whose conviction the District Court found to be supported by the trial record, and Smith, a convicted rapist, etc. whose sentence would only minutely be served before his appeal could be decided and whose release would likely endanger society.

Moreover, it is instructive to compare recent rulings requiring written reasons where parole, probation and prisoners rights are denied or revoked. In Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed 2d 484, 92 S. Ct. 2593 (1972), the Supreme Court held that "minimum due process" requires that a revocation of parole be supported by a written statement detailing the evidence and reasons relied upon for the revocation. This was extended to revocation of probation proceedings in Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed 2d 656, 93 S. Ct. 1756 (1973).

Two years ago, this Court ruled that the New York State Board of Parole must disclose the grounds on which parole is denied in a written statement sufficient to enable the reviewing body to determine whether discretion has been abused. U. S. ex rel. Johnson v. N.Y. State

Board of Parole, 363 F. Supp. 416 (E.D.N.Y. 1973), aff'd, 500 F. 2d 925 (2d Cir. 1974), vacated as moot, 42 L.E. 2d 289.

In accordance with the Supreme Court's advice in Wolff v. McDonnell, 94 S. Ct. 2963, 41 L Ed 2d 935 (1974), footnote 19, a spate of Federal decisions have come down, requiring prison authorities to state reasons for major changes in the conditions of confinement. See U. S. ex rel. Myers v. Sielaff, 381 F. Supp. 840 (D.C. Pa. 1974), where prisoner was denied release to a community work-treatment program; Walker v. Hughes, 386 F. Supp 32 (D.C. Mich 1974) where prisoner was subjected to punitive segregation; and in accord, Willis v. Ciccone, 506 F. 2d 1011 (8th Cir. 1974); Fife v. Crist, 380 F. Supp. 901 (D.C. Mont. 1974). Also, Clonce v. Richardson, 379 F. Supp. 338 (D.C. Mo. 1974) where there was transfer to a special, more rigid prison program; and Romers v. Shauer, 386 F. Supp. 853 (D.C. Col. 1974) where the transfer was out of the prison hospital.

The notion of a fortiori fairly jumps out of these cases, landing on the case at bar with such powerful impact as to make the requirement of supporting reasons for denial of bail go without saying. In each of the above examples the petitioners had exhausted all appeals; still, the authorities were not permitted by the courts to deal with them on an off-handed, peremptorial way. Can the concept of "minimal due process" mean less here, where petitioner has not had his conviction reviewed by an appellate tribunal? Must he serve all, or nearly all of his sentence before appeal, because a single judge, unreviewable under New York law, says so with a stroke of the pen? Is the word "denied", standi-alone, to be accorded the respect due only to reasoned judgment under the rule of law?

We submit that no "rational basis" appears here for the denial of bail; indeed, no basis whatever appears. Thus, the failure of the State Court to enunciate reasons for the denial inexoribly leads to the conclusion that no reasons existed. And that, of course, is the very definition of "arbitrariness".

3. The State Court Abused Its Statutory Discretion in Violation of Petitioner's Constitutional Rights.

The New York Criminal Procedure Law sets standards for the granting or denial of bail pending appeal. CPL 460.50 does not directly set the criteria; however, it does so by reference to an Article dealing with bail and recognizance. Sec. 530.50. Thus, as Professor (now Judge) Denzer points out in his Commentary to Sec. 460.50, the new CPL treats the subject "as primarily a bail problem", shifting the emphasis from the "stay" aspects of the former statute. § 510.30 (2b)

"In this setting", writes Judge Denzer, "the question of under what circumstances a defendant may or should be released on bail pending appeal appears quite analogous to questions of when he may or should be similarly released at various stages of the action prior to judgment. As with the latter, the principal problems concern the kind of restriction or control (amount of bail, confinement in prison, etc.) necessary to assure his future appearance when required (Sec. 510.30). A reasonable possibility of reversal on appeal - comparable to a reasonable possibility of acquittal in pre-judgment situations - is merely one factor, and doubtless not the most important one, to be considered on the bail application (Sec. 510.30 [2b])".

Even a determination that the appeal is palpably without merit

does not require a denial of the application, thought it would authorize it under Section 510.30(2b).

Since, as noted above, Justice Latham gave no reasons for the denial, we can only guess as to his grounds. In any event, whatever they may have been, they cannot survive the standards and criteria set forth in the CPL and in the cases interpreting the statute.

Is petitioner a bad bail risk? But he never missed an appearance in the three years between indictment and trial, and indeed, he made over fifty appearances in that time. He has all the requisite roots in the community: he was born in Queens County, he has lived there all of his sixty years, he has a family and a business there. Moreover, he has had three serious operations in the past two years and as soon as he arrived in Rikers Island, the doctors placed him in the hospital, where he is now. All of these facts hardly describe a "lamister" or potential "lamister".

But the People, in their zeal to place petitioner immediately in durance vile, insisted that his appeal was "without merit". They reached this conclusion, according to their own Affirmation, without reference to the trial record. Even so, perhaps this was the "reason" the State Court had in mind when denying the motion for bail.

If that is the case, there is still no "rational basis" for the denial. As petitioner pointed out in his Memorandum of Law to Justice Latham (attached hereto), the test, at most, is whether there are "arguable questions" to be determined on appeal. A defendant need not prove reversable error in application for bail pending appeal. CPL 460.50, 510.30. As Justice Shapiro said in People v. Marony, 347 N.Y.S. 2d 964, 966 (1973): "It is not necessary on an application such as this to determine

that the learned Trial Justice committed any prejudicial error in the trial or that the judgment of conviction will necessarily be reversed, but merely that there are arguable questions which should be determined on appeal before the defendants are compelled to serve the penalty of final incarceration".

In the only other reported New York case on the new CPL section, Justice Fein put it even stronger: "Where possible, a defendant should not be compelled to serve a prison sentence where there is any question whether the conviction may be reversed for error at the trial level". People v. Surretsky, 325 N.Y.S. 2d 31 (1971)(emphasis: the Court's) In that case, as in this one (and as in Marony), the sentences were short ones; thus, said Justice Fein, to deny the application for bail would "seriously water down or even make completely meaningless in any real sense defendant's right to appeal". Surretsky, at p. 34; and see Marony, supra at p. 965, 966, to the same effect.

Are there "arguable questions" or "any questions" regarding possible reversal in the case at bar? We submit that there are compelling questions of Constitutional dimension involved. Rather than repeat them, we respectfully refer the Court to the Memorandum of Law presented below and attached hereto. We believe that substantial questions regarding the Fourth Amendment's proscriptions against unreasonable searches and seizures exist and we believe we have presented them beyond the requirement, at this stage, of the New York statute. In our original affidavits to Justice Lathem, we raised other important questions, including the inconsistent, compromised jury verdict.

Still, a word must be said here, beyond what appears in the

Memorandum of Law below, about Taylor v. Louisiana, supra, the "women's juror" case. It is difficult to conceive of a situation, in modern times, wherein a ruling of the Supreme Court has been so blatantly disregarded. Taylor did not have an "all due deliberate speed" qualification; it was to have immediate effect, though not retroactive application. See Daniel v. Louisiana, 95 S. Ct. 704 (1975).

Yet two months after Taylor, Queens County was giving automatic jury exemption to women. On information and belief, it was the only county in New York City that had not conformed to Taylor by the time petitioner came to trial on March 21, 1975. Ironically, the county began to conform (again on information and belief) on April 1, the day petitioner was sentenced.

Petitioner made timely objection to the array and the panel on more than one occasion at trial. The objections were denied. As egregious as these denials were, theypaled in face of Justice Latham's refusal to consider them so much as "arguable" on the application for bail. If a trial judge's refusal to grant prospective force to a Supreme Court ruling is not an "arguable" appeals ground, then all law is reduced to sham, and CPL 460.50 becomes nothing more than a vehicle for judicial caprice; or, as Justice Shapiro suggested in Marony, supra, an opportunity for "rash vindictiveness...not consistent with the essential elements of fairness..."

CONCLUSION

Since no reasons for the denial o bail pending appeal were given by the State Court, and no "rational basis" for the denial appears but to the contrary petitioner fits squarely within the class entitled to

bail under the statute and case law of New York, we submit that the State Court ruling is violative of the Eighth and Fourteenth Amendments to the Constitution. The two reported New York cases, Maroney and Surretsky, supra, clearly reveal the lack of Due Process and Equal Protection in the instant case. Perhaps Judge Wright put it most eloquently in U. S. v. Thompson, 452 F. 2d 1333, 1340 (D.C. Cir. 1971), cert. den. 92 S. Ct. 1251 (1972):

"The harm done to an innocent defendant who 'serves time' before his conviction is reversed on appeal cannot be undone and serves as a continuing affront to our sense of justice. There may well be times when the state is justified nonetheless in denying bail pending appeal. But when different standards are applied to bail applications based upon an apparently arbitrary classification, the courts are not obliged to accept hypothetical or unfounded excuses for the distinction drawn".

Respectfully submitted,

PRIEST AND CARSON, ESQS.
SIDNEY ZION, Esq., of counsel

NEW YORK CIVIL LIBERTIES UNION
PAUL G. CHEVIGNY, Esq.

MARGARET SACHTER,
Legal Assistant on the Brief

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES EX. REL. NICHOLAS ABATE, :

75C1087

Petitioner-Relator, :

-against- :

BENJAMIN MALCOLM, Commissioner of Corrections; Warden, Rikers Island Prison, :

Respondents. :

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SUPPLEMENTARY MEMORANDUM OF LAW FOR PETITIONER

This supplementary memorandum of law sets forth further cases in which the federal courts have allowed bail pending appeal from a state conviction after exhaustion of remedies.

In Dawkins v. Crevasse, 391 F.2d 921 (5th Cir. 1968), the court found that the petitioners were making a non-frivolous appeal from a contempt conviction, and granted the writ.

In Boyer v. Orlando, 402 F.2d 966 (5th Cir. 1968), similarly to this case, the petitioner had a short sentence, as well as a substantial issue on appeal concerning jury trial. The Fifth Circuit allowed the writ.

Goodman v. Ault, 358 Supp. 743 (N.D. Ga. 1973) like this case, involved a one-year sentence, in that case for marijuana, and the writ was granted because of the likelihood that all

Exhibit I

or almost all of the sentence would be served if bail was not allowed.

Respectfully submitted,

Paul G. Chevigny

Priest and Carson,
Sidney Zion, of counsel

Attorneys for petitioner

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1462/72

ORDER TO SHOW CAUSE

UPON the annexed affidavit of SIDNEY SIGL, ESQ., sworn to July 14, 1975, the affirmation of PAUL J. GOLDMAN, ESQ. dated July 14, 1975 and upon the exhibits attached thereto and upon all prior proceedings had in the Supreme Court, Queens County, Appellate Division of the Supreme Court and the United States District Court of the Eastern District of New York, Let defendant-appellant file papers with the Secretary of the Suppression Unit of the Legal Aid Society

LET THE PLAINTIFF-RESPONDENT show cause before this Court at a Motion Term thereof to be held at the Appellate Division Courthouse located at 2 Hoyt Place, Brooklyn, New York, on the 28 day of July, 1975, at 9:30 AM in the forenoon of that day, or as soon thereafter as counsel may be heard,

WHY AN ORDER should not be made and entered;

1. Granting reasonable bail to the above-named defendant-appellant pending his appeal to this Court;

2. Granting such other and further relief as to this Court may seem just and proper.

LET SERVICE of a copy of this order together with a copy of the papers upon which it was granted on the Queens County District Attorney, on or

Exhibit J

before noon of July 23, 1975, be deemed good and sufficient service.

Dated: July 23, 1975
Brooklyn, New York

s/ H. J. Latham

Associate Justice of the Appellate
Division of the Supreme Court,
Second Judicial Department

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1402/72

AFFIRMATION

PAUL J. CURRAN, a duly licensed attorney of the State of New York, affirms the truth of the following, upon information and belief, under the penalties of perjury and pursuant to CPLR 2106, as follows:

1. Affiant is one of the attorneys for the above named defendant-appellant and submits this affirmation in support of the within Order to Show Cause.

2. On May 20, 1975, petitioner filed a Notice of Appeal and by order to show cause signed by Mr. Justice James T. Rawlins of the Appellate Division, Second Department, moved for bail pending appeal which motion was denied by Mr. Justice Henry J. Latham on May 23, 1975, without any opinion or reason given for such denial.

3. The petitioner moved to re-argue and such motion was denied again without opinion on June 17, 1975. Thereafter, petitioner made application to Judge Breitel of the New York Court of Appeals and again his application was denied without opinion.

4. Thereafter, defendant-appellant herein brought a petition in the U. S. District Court, Eastern District of New York, s.

a Writ of Habeas Corpus, releasing him on bail during the pendency of his appeal from the conviction of possession of stolen property which was rendered in the Supreme Court, Queens County. The District Attorney of Queens County opposed said application and Mr. Justice Platt rendered a memorandum and order dated July 15, 1975, copy of which is attached hereto and made a part hereof. Said Order provides, in part, as follows:

> "Accordingly, this Court grants petitioner's writ of habeas corpus but will stay the enforcement of the writ for fifteen days and authorize its dissolution if the state court, within that period either states that its denial was based upon the conviction and the trial record and in accordance with the provisions of Section 510.30 of the New York Criminal Procedure Law (e.g. "that the appeal is palpably without merit"), or upon the motion of petitioner, provides a hearing on the bail issue, and either grants reasonable bail or supports its denial with such a statement or with findings of fact that would enable a reviewing court to determine whether or not such denial was arbitrary".

5. At a hearing in the Federal Court, I am advised that a question was raised as to what transpired in the Supreme Court, Queens County, on June 16 and June 17, 1975. Affiant appeared on behalf of the defendant-appellant before Justice Dubin on June 16, 1975 and explained that we were waiting for a decision on the motion to reargue in the Appellate Division. Justice Dubin passed the matter for one day until June 17, 1975, pending the determination of said motion to reargue. On the morning of June 17, 1975, a warrant was issued when the defendant did not appear. This warrant was vacated, however, later that

day when affiant appeared in Court before Mr. Justice Dubin with the defendant, who surrendered and was incarcerated. On June 16, 1975, affiant discussed the matter with the District Attorney in the part and affiant and the assistant District Attorney agreed that it would be satisfactory as long as the defendant surrendered himself on the 17th in the event that an adverse decision was made by the Appellate Division on the motion to reargue as aforesaid.*

WHEREFORE, affiant prays that the within application be granted in all respects, together with such other and further relief as to this Court shall seem just and proper.

Dated: Forest Hills, New York
July 18, 1975

PAUL J. GOODMAN

* The full record of the pre-trial suppression hearing and the record of the trial itself was not submitted to either Justice Latham or Justice Fuchsberg. ~~It can be made available upon request~~. The aforesaid minutes were not in my possession at that time, but are in my possession at present. They can now be made available upon request.

P.J.J. per m.H. Sachter

State of New York)
)ss:.
County of New York)

Sidney Zion, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bar of this Court, and I make this affidavit in support of a bail application.

2. An allegation has been made that Mr. Abate failed to appear on one occasion before trial and forfeited his bail. The truth about this episode is as follows.

3. On the day in question, the matter had been adjourned by mutual consent of the parties. The case nevertheless appeared on the calendar, the defense was not present, and the representative of the prosecutor who was present neglected to tell the court about the adjournment. A bench warrent issued and was executed immediately by the bail bondsman. I telephoned the prosecutor in charge of the case, who recognised the error and immediately went to Part I of Supreme Court, Queens. He explained to the judge that it was a mistake. Mr. Abate had been on $3,500 bail, and as a result of this, he was released on his own recognizance the same day. He remained on his own recognizance until after his conviction several months later.

4. On information and belief, in the early hours of Friday, July 11, 1975, Mr. Abate was taken to Kings County Hospital from the hospital at Rikers Island. I was informed that he was dehydrated, and his blood pressure had dropped precipitously at Rikers Island Hospital. He also had chest pains.

5. On Sunday July 13, 1975, I went to Kings County Hospital for a visit. I saw Mr. Abate handcuffed to a bed, but the guard refused to permit me to visit my client unless I had an order from the warden. Mr. Abate has had three major operations in the past year or so, and needs the care of his doctor.

6. At the time of trial, I raised the issue with the trial Justice of the denial of Mr. Abate's rights to a panel of jurors chosen in accordance with Taylor v. Louisiana ____ U.S.___ 42 L. Ed. 2d 690. Any case tried after the decision in Taylor on January 21, 1975 was required to comply with it. The trial began on or about March 21, 1975. On March 18, 1975, furthermore, a state law went into effect providing a state mechanism for selecting a panel in accordance with Taylor. A copy is attached. It was, therefore, not only possible but mandatory for the Supreme Court to give Mr. Abate a panel of jurors which was drawn in accordance with Taylor.

Sidney Zion

Sworn to before me this
18 day of July, 1975.

s/ Margaret Fung
Notary Public

31-4528132
Qual Kings Co
Comm expires 3/31/76

dollars in value, and personal property for like uses to an amount not exceeding seventy-five thousand dollars in value.

§ 2. This act shall take effect immediately.

Jury—Women—Selection

Memorandum relating to this chapter, see page A-143

CHAPTER 21

An Act in relation to authorizing a method for the selection of women for jury panels for a limited period of time.

Approved March 18, 1975, effective as provided in section 4.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. (a) Additional jurors. In any criminal action if the defendant challenges a jury panel returned for the term, pursuant to section 270.10 of the criminal procedure law, and establishes that the numbers of female persons (i) on the county jury list or in the county jury pool or reservoir from which the panel for the term has been drawn and (ii) on the panel for the term, are substantially disproportionate to the number of female persons in the county, the court shall proceed as follows: The court shall order the panel for the part, if any, returned to the panel for the term. Having made that order, or if there is no panel for the part, the court shall order the commissioner of jurors or the county clerk to draw additional female trial jurors for the term, to be chosen at random from among the female persons who are on the county jury list or in the county jury pool or reservoir, by such reasonable means as the commissioner or county clerk shall determine. The court shall specify the number of additional female jurors to be drawn, which shall be sufficient to provide that the panel for the term include female jurors in substantial proportion to the number of female persons in the county. The additional jurors must forthwith be given such notice as the court directs that they must attend the term.

(b) Random selection of jurors for a part. After a jury panel for the term is supplemented pursuant to paragraph (a), the panel for a part of the term, if any, shall be chosen at random in the same manner as if the panel for the term had not been supplemented.

§ 2. The officer authorized to summon prospective jurors, in lieu of using any other method of service permitted by law, may cause the summons to be served by mail. In the discretion of such officer, any prospective juror may be examined by mail as to the prospective juror's qualifications to serve. The officer authorized to summon and examine a prospective juror, in lieu of a personal interview, may mail or cause to be mailed to the prospective juror a juror qualification questionnaire which the person to whom the questionnaire is mailed must complete, sign and return to the officer, within one week. The eligibility and requirement of the prospective juror to serve, including qualifications, claim for disqualification, claim for exemption, or application for excuse or postponement, may be determined on the basis of the questionnaire.

If the questionnaire is not returned or properly completed the officer may summon the prospective juror to appear before him for the purpose of filling out the questionnaire and testifying as to competence, qualifications, eligibility and liability to serve as a juror and to present claims or applications for exemption, disqualification, excuse or postponement. Such person shall not be entitled to any fee or mileage

when responding for such purpose. The summons may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution, the summons shall require the person summoned to attend not less than five days after service. If served by mail the summons shall require the person summoned to attend not less than eight days after the mailing.

§ 3. The provisions of this act shall be controlling notwithstanding any general, special or local law to the contrary.

§ 4. This act shall take effect immediately, but shall remain in force only until September first, nineteen hundred seventy-five.

Deer, Bear—Hunting—Special Open Season

CHAPTER 22

An Act to amend the environmental conservation law, in relation to taking deer and bear by use of a longbow.

Approved and effective March 18, 1975.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph b of subdivision three of section 11-0907 of the environmental conservation law, as amended by chapter two hundred seventy-one of the laws of nineteen hundred seventy-four, is hereby amended to read as follows:

b. Such special open season for each area shall be from October 15 through the day immediately preceding the regular open season for deer stated in column two of the table set forth in subdivision 2, except that in the Northern Zone each special season shall be from October 1 through October 24, and in the Southern Zone such special season shall also include the five days following the closing of the regular open season.

§ 2. This act shall take effect immediately.

New York City—Civil Court, Small Claims—Jurisdiction

Memorandum relating to this chapter, see page A-143

CHAPTER 23

An Act to amend the New York city civil court act, in relation to increasing the jurisdiction of the small claims part.

Approved March 18, 1975, effective Sept. 1, 1975.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eighteen hundred one of the New York city civil court act, as last amended by chapter five hundred ten of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

§ 1801. Small claims defined

The term "small claim" or "small claims" as used in this act shall mean and include any cause of action for money only not in excess of ~~$500~~ $1,000 exclusive of interest and costs, provided that the defend-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES ex rel NICHOLAS ABATE,

Petitioner-Relator,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents

- -x

75 C 1087

MEMORANDUM AND ORDER

July 15, 1975

PLATT, D.J.

By an order to show cause, a petition and an affidavit verified by his attorney, petitioner-relator seeks a writ of habeas corpus releasing him on bail during the pendency of his appeal from a conviction of possession of stolen property after trial by jury on April 1, 1975, before The Honorable Albert H. Buschmann who sentenced him on May 16, 1975 to a term of one year.

On May 22, 1975, petitioner filed a Notice of Appeal and by order to show cause signed by Mr. Justice James D. Hopkins of the Appellate Division, Second Department, moved for bail pending appeal which motion was denied by Mr. Justice Henry J. Latham on May 30, 1975, without any opinion or reason given for such denial.

The petitioner moved to re-argue and such motion was denied again without opinion on June 17, 1975. Thereafter, petitioner made application to Judge Fuchsberg of the New York Court of Appeals and again his application was denied without opinion.

FPI—SS—3-17-72—30M—9153

The Assistant District Attorney states in his opposing papers that:

> "*** [D]uring the proceedings at the trial court level petitioner forfeited his originally posted bail of $3500. He was subsequently brought to Court by agents of the bail bonding company. Petitioner has contended in papers submitted to the Appellate Division, Second Department, that his failure to appear was due to a clerical error. However, this fact is not substantiated in any papers which have previously been submitted.
>
> "***Petitioner failed to appear in Court on June 16, 1975, for surrender and that on June 17, 1975 the Honorable Bernard Dubin found it necessary to issue a bench warrant for defendant. Although petitioner did eventually willingly surrender, this failure to appear coupled with the earlier failure * * * are factors which this Court should consider in making its determination."

The Assistant District Attorney on the oral argument also claimed that the petitioner had a prior record but as it turns out such record consists of two State Court convictions for offenses which occurred some 30 years ago.

Petitioner states that he is a 60 year old man who lives with his family in Queens County, owns his own business and has had three major operations in the past two years and is now in the hospital at Rikers Island where he was placed upon his surrender to serve his sentence on June 17, 1975.

Petitioner claims further that since his arrest on the present charges, he made more than 50 court appearances and at the time of his trial and sentence was free on his own

recognizance.

Petitioner further claims that there are good grounds for his appeal in that his conviction arose out of an illegal arrest, search and seizure in violation of his Fourth Amendment rights and in that despite his challenge to the jury panel (on which there was only one woman) both prior to and at the outset of his trial under Taylor v. Louisiana, U.S. , 95 S.Ct. 692; 42 L.Ed. 2d 690 (January 21, 1975), and under Chapter 21 of the New York Laws of 1975, effective March 18, 1975) his challenge was denied.

Finally, petitioner argues that his sentence was for a term of only one year, that the Appellate Division will not hear argument on his appeal until the September or October Term, and that by the time of the Appellate Division's decision on such appeal he will have in all probability served the greater part, if not all, of his sentence.

In reply the Assistant District Attorney states that the time for the filing of petitioner's brief on appeal to be heard in the September Term has already expired and that petitioner has not requested a preference for his appeal.

This Court is extremely reluctant to interfere with State Court decisions and procedures but finds this case to be an extremely troublesome one.

FPI—SS—3-17-72—30M—9153

Neither party furnished the Court with the record of the pre-trial suppression hearing or the record of the trial itself. Furthermore, it is not entirely clear whether either or both such records were furnished to Mr. Justice Henry J. Latham or Judge Jacob Fuchsberg. Petitioner argues, for example, that "the People in its opposition to petitioner's motion for bail, conceded that it had not read the record of the trial; thus it was not depending on the record to seek petitioner's immediate remand. In none of the its subsequent papers, did the prosecutor rely on the trial record to oppose bail; instead, he simply stated his conclusion that the appeal was 'without merits'" (Resp. Br. pp 3 and 4).

Moreover, had Mr. Justice Latham in his order denying petitioner's application given his reasons therefor, defendant might well have been satisfied or alternatively the Court might be in a better position to understand the action taken.

Based upon the papers before this Court at this time, however, petitioner appears to have good arguments for presentation to the Appellate Division on his appeal.

Under these circumstances, this Court feels that the decision in United States ex rel. Keating v. Bensinger, 322 F.Supp. 784 (N.D. Ill., E.D. 1971), is applicable herein. There the Court made the following pertinent comments (322 F.Supp. 787-788):

FPI—SS—3-17-72—30M—9153

"Absent any findings in support of the denial of bond, it is impossible to ascertain whether or not such denial was arbitrary or discriminatory. Respondents urge in effect that the denial of bail without findings or reasons if proper and since, absent such findings, the petitioner has been unable to demonstrate that the denial of bail was arbitrary, the petition should be denied. If they are correct, the guaranty of the Eighth and Fourteenth Amendments against arbitrariness by a state court in the setting of bail authorized by the state legislature could be reduced to a nullity by the mere silence of the court denying bail. If a court may deny bail with no reason, hardly any set of circumstances can be imagined wherein it could be determined by a reviewing court that the denial was arbitrary or discriminatory. Respondents do not dispute this but urge that such is and should be the law. We do not agree that the right to a reasonable setting of bail may, in effect, be repealed by any court by its mere failure to provide reasons for its action that can be examined by a reviewing court. We conclude, therefore, that the failure of the Appellate Court to state any reasons for its decision was in itself an arbitrary action in relation to petitioner's motion for bail pending appeal.

"We explicitly note that we are not holding that no justifiable reasons may exist for the denial of bail to petitioner. We conclude only that the state court's failure to provide any basis for its decision to deny bail creates a presumption of arbitrariness. We are not holding that an eighteen year old convicted of the sale of marijuana, who has been sentenced to a term of ten to twenty years, and who has no prior felony convictions has an absolute constitutional right to bail pending appeal. Our conclusion is merely that, when a state court denies bail authorized by the state legislature without providing any supporting reasons, the failure to indicate the motivating reasons for the denial of bail is in and of itself an arbitrary action that violates the Eight and Fourteenth Amendments. Any other rule would effectively nullify the protection of those Amendments.

"As we have concluded that petitioner's Eighth and Fourteenth Amendment rights were violated by the state court's denial of bail without any supporting reasons, we grant his writ of habeas corpus. However,

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as we have not ruled that petitioner has a constitutional right to bail but merely that his procedural rights guaranteed by the constitution have been violated, we feel obliged to allow the state an opportunity to correct this deficiency. Therefore, we will stay the enforcement of the writ for fifteen days and authorize its dissolution if the state court, within that period and upon the motion of petitioner, provides a hearing on the bail issue, and either grants reasonable bail or supports its denial with findings of fact that would enable a reviewing court to determine whether or not such denial was arbitrary."

It should be noted, however, that another Judge in the same court at a later date has questioned the aforestated presumption of arbitrariness in the case of United States ex rel. Kane v. Bensinger, 350 F.Supp. 181 (N.D. Ill., E.D. 1972). While this modification might weigh against this Court's granting the writ and fixing bail on condition that the defendant prosecute his appeal promptly, it should not, in this Court's view, affect the granting of similar relief to that accorded in the Keating case, supra, given all of the above stated facts in the case at bar.

Accordingly, this Court grants petitioner's writ of habeas corpus but will stay the enforcement of the writ for fifteen days and authorize its dissolution if the state court, within that period either states that its denial was based upon the conviction and the trial record and in accordance with the provisions of Section 510.30 of the New York Criminal Procedure Law (e.g.,"that the appeal is palpably without merit") or upon the motion of petitioner, provides a hearing on the bail issue, and either grants reasonable bail or supports its

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denial with such a statement or with findings of fact that would enable a reviewing court to determine whether or not such denial was arbitrary.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

APPELLATE DIVISION : SUPREME COURT
SECOND JUDICIAL DEPARTMENT

BEFORE: HON. HENRY J. LATHAM, Associate Justice.

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THE PEOPLE, etc.,

Respondent,

v. Order

JOHN DOE, a/k/a NICHOLAS ABATE,

Appellant.

----------x

In the above entitled cause, the above named John Doe a/k/a Nicholas Abate, defendant, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered May 16, 1975; and the undersigned having denied appellant's application, by order dated May 30, 1975, to stay execution of said judgment and to release appellant on his own recognizance or to fix bail pending determination of his appeal from said judgment; and the appellant having moved for reargument of said prior application and for leave to have counsel for appellant present oral argument on said reargument;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion is hereby denied.

Dated, Brooklyn, N. Y.,
June 17, 1975.

Henry J Latham

Hon. Henry J. Latham,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

Exhibit K

Send to Appeals Bur.

received 5/22/75

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART XII: COUNTY OF QUEENS

---X

THE PEOPLE OF THE STATE OF NEW YORK — Ind. No. 1482/72

--against--

JOHN DOE, a/k/a NICHOLAS ABATE, — NOTICE OF APPEAL

Defendant.

---X

S I R S :

PLEASE TAKE NOTICE, that the defendant herein hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, from the judgment of conviction rendered against him on the 16th day of May, 1975, in the Supreme Court, County of Queens, and from each and every part of such judgment.

Yours, etc.

PRIEST AND CARSON, ESQS.
Attorneys for Defendant
71-23 Austin Street
Forest Hills, New York 11375

TO: District Attorney
Queens County

Clerk of the Court
Queens County

Exhibit L

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1482/72

ORDER TO SHOW CAUSE

UPON the annexed affirmation of PAUL J. GOODMAN, Esq., dated the 10 day of June, 1975, and upon the Show Cause Order dated May 22, 1975, and the papers attached thereto, and upon the affirmation of JOSEPH DeFELICE, Esq., dated May 27, 1975, in opposition to the Show Cause Order as aforesaid, and upon the Order of Honorable HENRY J. LATHAM, Associate Justice of the Appellate Division, Second Judicial Department, dated May 30, 1975, denying said motion and upon all of the proceedings previously had herein,

LET the plaintiff-respondent show cause before this Court at a Motion Term thereof to be held at the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on the 16 day of June, 1975, at 9:30 AM, in the forenoon of that day, or as soon thereafter as counsel may be heard, why an Order should not be made and entered pursuant to Section 440-50 of the Criminal Procedures Law:

1. Granting reargument of the aforesaid Show Cause Order and upon said reargument, granting the relief requested therein;

2. Granting counsel for the defendant-appellant, oral argument of the within application;

3. Granting such other and further relief

Exhibit M

as to the Court may seem just and proper.

SUFFICIENT CAUSE APPEARING THEREFOR, it is further ordered that pending the hearing and determination of this application, the execution of the judgment of conviction of the defendant be, and the same hereby is, stayed.

LET SERVICE of a copy of this Order together with a copy of the papers upon which it was granted on the Queens County District Attorney, on or before noon of June 11, 1975, be deemed good and sufficient service.

Dated: Brooklyn, New York
June 10, 1975

H J Latham

Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1482/72

AFFIRMATION

PAUL J. GOODMAN, a duly licensed attorney of the State of New York, affirms the truth of the following, under penalty of perjury, and pursuant to CPLR 2106:

1. He is the attorney for the above-named defendant, and makes this affirmation in support of the instant application for an Order rearguing the motion to stay execution of a judgment of the Supreme Court, Queens County, rendered May 16, 1975, and to release appellant on his own recognizance, or to fix bail pending determination of his appeal from said judgment, and upon reargument, granting defendant the relief requested.

2. Affiant herein did not have an opportunity to reply to the statement of JOSEPH DeFELICE, Esq., an Assistant District Attorney of Queens County, in that the original motion was returnable on May 27, 1975 and Mr. DeFELICE's affirmation dated May 27, 1975, did not reach my office until May 29, 1975.

3. Defendant intends to promptly process his appeal and he has advised me that he recently obtained the minutes of his trial from the Court stenographer. Notwithstanding a diligent effort on his part to go

forward, it may very well be that by the time the appeal is determined, the defendant will have served his one year sentence and a reversal will certainly be no more than a hollow pryyhic victory. The People have not shown that they will be prejudiced in any way or fashion, if the said sentence is stayed pending appeal, and it is respectfully submitted that the possible injustice to the defendant far outweighs the People's demand for instant punishment after conviction. Defendant is a lifelong resident of the State of New York, and is ready and willing to post reasonable bail if this Court feels constrained to require some pending appeal to this Court.

4. Mr. DeFELICE states that he is unable to fully evaluate the allegations of error raised by defendant because he is not in possession of a complete copy of defendant's trial record. [I believe that a full evaluation of the record will in fact show that the verdict was repugnant, since the dismissal of the bribery charge indicates that the jury disbelieved the defendant's involvement with the alleged crimes.] Defendant ABATE claimed he was moving an ice box at the time of the incident (Page 2 of Decision of Hon. JOSEPH J. KUNZMAN attached to original moving papers) (and the claim of the alleged bribery was the proof relied on to establish defendant's knowledge that the goods were stolen. In order to prove the indictment, the District Attorney had to prove, and the jury had to believe, that defendant "knowingly possessed stolen property owned by Coca Cola, U.S.A." Since the jury rejected the claim that defendant ABATE attempted to bribe the officer, i.e., "take what's in my rear pocket and let me go", and the subsequent alleged attempt to hand over money, the proof of knowledge of the theft must also fall. As stated by Justice KUNZMAN, in the aforesaid decision on the

motion to suppress, "After some four hours, the police learned that the truck and its contents were in fact stolen and defendant was then arrested for possession of stolen property". The mere fact that defendant was in the vicinity of the stolen property would not be sufficient to sustain a jury finding that he "possessed" these goods with "knowledge" that they were stolen. The guilty verdict is repugnant to the acquittal on the bribery charge, and affiant submits that this issue will be resolved in defendant's favor on appeal.

5. The Constitutional argument that the jury panel did not satisfy the rights of TAYLOR v. LOUISIANA, 95 S. Ct. 692 (1975) is a viable argument on appeal, and the Assistant District Attorney does not deny that only one woman was seated in the jury panel. The Taylor case was decided after PEOPLE v. SESSION, 34 N.Y. 2d 254 (1974) cited at Page 3 of Mr. DeFELICE's affirmation and that case has no bearing on the later determination by the U. S. Supreme Court.

6. Defendant is required to appear at Part I of the Supreme Court on ~~Friday,~~ Monday, June 16, 1975, to surrender for the purpose of starting his prison sentence. An immediate stay of execution of the said judgment and an Order of Recognizance is, therefore, essential to prevent his incarceration pending the determination of the appeal. No previous application for relief sought herein has been made to the Appellate Division or to any Court except the Show Cause Order dated May 22, 1975.

WHEREFORE, affiant prays that an Order be made and entered staying or suspending the execution of the judgment pending determination of the appeal to this Court and releasing the defendant on his own recognizance.

Dated: Forest Hills, New York
June 10, 1975

PAUL J. GOODMAN

JDeF:lrr
5/18/75

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, : AFFIRMATION

Plaintiff-Respondent, : Indictment No. 1482/72

-against- :

JOHN DOE A/K/A :

NICHOLAS ABATE, :

Defendant-Appellant.

STATE OF NEW YORK)
:ss.:
COUNTY OF QUEENS)

I, Joseph DeFelice, being an attorney at law admitted to practice in the Courts of this State and an Assistant District Attorney of Queens County, in the office of NICHOLAS FERRARO, District Attorney of Queens County, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury except such as are made upon information and belief, which matter I believe to be true.

1. On May 16, 1975, defendant was sentenced to a one year term of imprisonment by the Honorable Albert Bushmann of the Supreme Court, Criminal Term, Queens County.

2. This affirmation is submitted in opposition to defendant's Memorandum of Law which he submitted in support of his motion for reargument for a stay of execution.

Exhibit N

3. On May 30, 1975, the Honorable Henry J. Latham denied defendant's motion for a stay of execution.

4. In his Memorandum of Law defendant relies upon the same arguments made in his previously denied request for a stay and the People, therefore, rely upon papers which have already been submitted. However, it should be added that, contrary to defendant's contentions, a search warrant is not necessary to sustain the admissibility of evidence seized in plain view. It is clear that warrantless searches "are per se unreasonable...subject only to a few specifically established and well delineated exceptions". Katz v U.S.,389 U.S. 347,357 (1967). The People submit that the doctrine of plain view is one of these exceptions. Harris v New York, 390 U.S. 234 (1968). In order to sustain a seizure of items under the doctrine of plain view the following elements are required:

1. A prior valid intrusion.
2. An inadvertant spotting of the evidence in plain view.

As the decision of Judge Kunzeman [attached to defendant's initial request for a stay] and the arguments made in papers previously submitted by the People indicate, these elements were established in the case at bar. The radio call that the police received to investigate a truck in that area [the truck was the only one on the street] justified the presence of the officers "inside a constitutionally protected area". Coolidge v New Hampshire, 403 U.S. 443, 466 (1971).

3. On May 30, 1975, the Honorable Henry J. Latham denied defendant's motion for a stay of execution.

4. In his Memorandum of Law defendant relies upon the same arguments made in his previously denied request for a stay and the People, therefore, rely upon papers which have already been submitted. However, it should be added that, contrary to defendant's contentions, a search warrant is not necessary to sustain the admissibility of evidence seized in plain view. It is clear that warrantless searches "are per se unreasonable...subject only to a few specifically established and well delineated exceptions". Katz v U.S.,389 U.S. 347,357 (1967). The People submit that the doctrine of plain view is one of these exceptions. Harris v New York, 390 U.S. 234 (1968). In order to sustain a seizure of items under the doctrine of plain view the following elements are required:

1. A prior valid intrusion.
2. An inadvertant spotting of the evidence in plain view.

As the decision of Judge Kunzeman [attached to defendant's initial request for a stay] and the arguments made in papers previously submitted by the People indicate, these elements were established in the case at bar. The radio call that the police received to investigate a truck in that area [the truck was the only one on the street] justified the presence of the officers "inside a constitutionally protected area". Coolidge v New Hampshire, 403 U.S. 443, 466 (1971).

5. The Memorandum of Law also notes that defendant has never missed a court appearance and that it is unlikely that he would jump bail. However, upon information and belief, Supreme Court Justice Dubin found it necessary to issue a bench warrant for defendant on June 17, 1975 for his failure to appear for surrender. Upon information and belief, defendant had also failed to appear in court on the preceding day. Although defendant did eventually willingly surrender, this is a factor which the Court should consider in making its determination.

WHEREFORE, it is respectfully requested that defendant's motion be denied.

Dated: Kew Gardens, New York
June 18, 1975

Joseph R. DeFelice

JOSEPH DeFELICE

A 10477

Attorney on the motion — 212 671
Paul Goodman
71-23 Austin St
Forest Hills 11375
B089090

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1482/72

SHOW CAUSE ORDER

UPON the annexed affirmation of SIDNEY ZION, ESQ., dated the 21 day of May, 1975, the affirmation of PAUL J. GOODMAN, ESQ., dated the 21 day of May, 1975, the indictment, the judgment which included a one year sentence of imprisonment, the Notice of Appeal annexed hereto, and all proceedings previously had in Criminal Term, Part 12, Supreme Court, Queens County,

LET THE PLAINTIFFS-RESPONDENTS SHOW CAUSE before this Court at a motion term thereof to be held at the Appellate Division Courthouse located at 2 Monroe Place, Brooklyn, New York, on the 27 day of May, 1975, at , or as soon thereafter as counsel may be heard,

by Mr. Justice Lupiano

WHY AN ORDER should not be made and entered, pursuant to Section 460.50 of the Criminal Procedure Law:

1. Staying or suspending the execution of the judgment pending the determination of the appeal to this Court; and

2. Releasing defendant on his own recognizance, pending the determination of said appeal; and

3. Granting such other and further relief as to the Court may seem just and proper.

Exhibit O

SUFFICIENT CAUSE APPEARING THEREFOR, it is further ordered that pending the hearing and determination of this application the execution of the judgment of conviction of the defendant be, and the same hereby is, stayed.

LET SERVICE of a copy of this order together with a copy of the papers upon which it was granted on the Queens County District Attorney, on or before 4:30 PM of May 22, 1975, be deemed good and sufficient service.

Dated: May 22, 1975
~~Forest Hills~~, New York
Brooklyn

JAMES D HOPKINS
Associate Justice of the Appellate
Division of the Supreme Court,
Second Judicial Department

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

JOHN DOE, a/k/a NICHOLAS ABATE,

Defendant-Appellant.

Ind. No. 1402/72

AFFIRMATION

PAUL J. GOODMAN, ESQ., a duly licensed attorney of the State of New York, affirms the truth of the following, upon information and belief, under the penalties of perjury and pursuant to CPLR 2106, as follows:

1. On May 21, 1975, affiant was retained by the defendant herein for the purpose of filing a Notice of Appeal and making the within application to this Court for a stay of execution of the judgment and to continue the defendant on his own recognizance.

2. I am informed by the trial attorney, SIDNEY ZION, ESQ., that the defendant was sentenced to one year imprisonment by Honorable Albert Buschman on May 16, 1975 and that at the time of sentencing, he was given a week to stay the execution of the sentence by application to the Appellate Division.

3. Affiant discussed the matter with SIDNEY ZION, ESQ. and as per the contents of his within affirmation, it is respectfully submitted that this defendant has a good and meritorious appeal herein predicated upon the issues raised in the aforesaid affirmation.

4. In view of the legal questions and the

research involved, it may well be that by the time that the appeal can be prosecuted, argued and decided, and perhaps appealed to the Court of Appeals, that the defendant will have served many months or all of his sentence. If the judgment is reversed, the defendant will have suffered irreparable harm by continued incarceration unless this Court, in addition to the requested stay of execution of the judgment, releases defendant pending the determination of the appeal.

5. The reason this application is brought on by way of Order to Show Cause, is that I am advised that this defendant must surrender himself at Part I of the Supreme Court, Queens County, on Friday, May 23, 1975 and an immediate stay of execution of the judgment and an order of recognizance is therefore essential to prevent his incarceration pending determination of the appeal. Deponent advised by defendant that he had two previous felony convictions, to wit: a robbery conviction in 1939 & an assault in 1943 He had been incarcerated x6.

No previous application for the relief herein sought has been made to this Appellate Division or to any other Court.

WHEREFORE, affiant prays that an order be made and entered staying or suspending the execution of the judgment pending determination of the appeal to this Court and releasing the defendant on his own recognizance.

Dated: Forest Hills, New York
May 21, 1975.

/s/
PAUL J. GOODMAN

x each session, the first for apparently 3 yrs on a indeterminate sentence up to 10 yrs. The second sentence was for 5-10 years, and defendant did apparently 4½ yrs.

P & I-165.40,45,50
MZY - 10/67

Indictment For

CRIMINAL POSSESSION OF STOLEN PROPERTY 1st DEG (Section 165. xxxxxxxx BURGLARY

SUPREME COURT: CRIMINAL TERM
QUEENS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE
A/K/A NICHOLAS ABATE

Defendant.

No. 1482-72

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of Criminal Possession of Stolen Property, FIRST Degree, committed as follows:

The defendant abovenamed,

on or about February 16, 1972

in the County of Queens, State of New York, knowingly possessed stolen property owned by COCO COLA USA

to wit, approximately 3600 gallons of Coca Cola Syrup and trailer #HPN 395124

with intent to benefit said defendant(s) and person(s) other than the owner thereof and to impede the recovery by an owner thereof, said property having a total value of more than $1500.00.

EX-A

GI-18

Indictment For

SUPREME COURT: CRIMINAL TERM
QUEENS COUNTY

BRIBERY (200.00 P.L.)

THE PEOPLE OF THE STATE OF NEW YORK

against

JOHN DOE
A/K/A NICHOLAS ABATE

Defendant.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, by this indictment, accuse the defendant of the crime of BRIBERY,

committed as follows:

The defendant aforenamed,

on or about February 16, 1972

in the County of Queens, State of New York, did confer and offer and agree to confer a benefit upon a public servant to wit JOSEPH HERNDLHOFER upon an agreement and understanding that such public servant's vote, opinion, judgment, action, decision and exercise of discretion as a public servant will thereby be influenced, in that defendant offered him money to drop the charges.

DISTRICT ATTORNEY

At a Criminal Term, Part XI, of t
Supreme Court, held in and for
the County of Queens, at the
Courthouse, 125-01 Queens
Boulevard, Kew Gardens, New Yo
on the 16 day of April 1

PRESENT:

Hon. JOSEPH J. KUNZEMAN
Justice

CB:pas

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NICHOLAS ABATE
Defendant

Ind. No. 1482-72

Motion to suppress eviden

Submitted

Argued

Hearing March 29

The following papers numbered
1 to 3 submitted in this motion

Bert Nissonoff, Esq.
For the Motion

James Mosely, A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 - 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	
Replying Affidavits	
Exhibits	
Hearing Minutes	3

Upon the foregoing papers, and the opinion of the Court herein, the motion is denied.

GRANTED:

JOSEPH J. KUNZEMAN
J.S.C.

Date: April 16, 1973

John J. Durante

CV B

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART XI

~~CB:pas~~

THE PEOPLE OF THE STATE OF NEW YORK

--against--

NICHOLAS ABATE

Defendant.

BY JOSEPH J. KUNZEMAN J.
DATED April 16 1973
Ind. No. 1482-72

This is a motion by defendant NICHOLAS ABATE for the suppression of evidence allegedly obtained by an illegal search and seizure.

The hearing was held on March 28 and 29, 1973 and from the testimony adduced therein the Court makes the following findings of facts and conclusions of law.

at approximately 10:15 PM on November 16, 1972 two police officers in a response to a radio run to investigate a truck, went to the vicinity of 11-01 36th Avenue, Queens County. They found a 41 foot gray Fruehauf Trailer, across the sidewalk, backed against the wall of a vacant store in which there was an opening which formerly was a delivery door. The premises was located in a factory area; there were no persons on the street; nor other business establishments open and no other trailers on the street. Approaching the trailer, voices were heard from inside the building. One officer observed defendant ABATE and one RAYMOND BOYD standing in the wall opening and reaching into the trailer and taking out drums of what later proved to be Coca Cola syrup. The other officer's first observation of the defendant and RAYMOND BOYD was upon entrance into the vacant store whereupon he saw each moving his drum of syrup. Both were asked what they were doing, to which they did not

respond and at that juncture they were separated. Defendant ABATE was again asked what he was doing and he answered that he was moving an ice box. Defendant had no identification for either the truck or its contents. Defendant then told the officer "take whats in my rear pocket and let me go" and the defendant then reached into his pocket and gave the officer a handful of money. The defendant was then placed under arrest for bribery. After some four hours, the police learned that the truck and its contents were in fact stolen and defendant was then arrested for possession of stolen property.

The theory of defendant in seeking to suppress the items is that "lacking the knowledge that the trailer and its contents were stolen at the time of defendants arrest there was no probable cause to arrest and thus the seizure was improper as not incident to a lawful arrest". However, the seizure was not based on the arrest. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence (Harris v. United States, 390 U. S. 234). Clearly the officers investigatory powers justified their presence on the premises. Further, it is manifest that the items sought to be suppressed were in plain view and to an experienced officer, based upon the totality of circumstances, including defendant's offer of a bribe, went beyond mere suspicion that the items were the "fruits" of a crime.

The Court thus finds that the officers had a right to seize the trailer and its contents and that defendant has failed to demonstrate that the seizure was illegal and the items subject to suppression. The motion is denied.

Order entered accordingly. The clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant.

JOSEPH J. KUNZMAN

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART XII: COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK — Ind. No. 1482/72

-against-

JOHN DOE, a/k/a NICHOLAS ABATE, — NOTICE OF APPEAL

Defendant.

S I R S :

PLEASE TAKE NOTICE, that the defendant herein hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, from the judgment of conviction rendered against him on the 16th day of May, 1975, in the Supreme Court, County of Queens, and from each and every part of such judgment.

Yours, etc.

PRIEST AND CARSON, ESQS.
Attorneys for Defendant
71-23 Austin Street
Forest Hills, New York 11375

TO: District Attorney
Queens County

Clerk of the Court
Queens County

JD/jr
5/27/75

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

The People of the State of New York,

Plaintiff-Respondent,

-against-

JOHN DOE a/k/a
NICHOLAS ABATE

Defendant-Appellant,

Indictment No. 1482/72
AFFIRMATION

State of New York)
:ss.:
County of Queens)

I, Joseph DeFelice, being an attorney at law admitted to practice in the courts of this state and an Assistant District Attorney of Queens County, in the office of Nicholas Ferraro, District Attorney of Queens County, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury except such as are made upon information and belief, which matter I believe to be true.

1. This affirmation is submitted in opposition to the defendant's application for an order under Section 460.50 of the Criminal Procedure Law, to stay the execution of a judgment of the Supreme Court, Criminal Term, Queens County, rendered May 16, 1975 by the Honorable Albert Buschman, and sentencing him to a one year term of imprisonment.

2. The defendant was indicted, under Indictment Number 1482/72, for the crimes of criminal possession of stolen property in the first degree and bribery in the second

Exhibit P

degree.

3. Defendant's motion to suppress evidence was denied, after a hearing, on April 16, 1973 by the Honorable Joseph J. Kunzeman.

4. Since the People arenot in possession of a complete copy of defendant's trial record, we are unable to fully evaluate the allegations of error raised by defendant. However, from a reading of defendant's motion papers and the papers annexed thereto, it appears that defendant's appeal is without merit for the following reasons:

(a) As to his contention that the seizure of the truck and its contents was illegal, it is submitted that, under the facts, the police investigatory powers justified the presence of the officers ("inside a constitutionally protected area") [Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)] and that the seizure was made of items which fell within "plain view" of the officers [Harris v. New York, 390 U.S. 234 (1968)].

(b) Defendant also contends that the acquittal on the charge of bribery, which crime served as part of the circumstantial proof of defendant's knowledge that the goods were stolen, requires a reversal of the conviction for criminal possession of stolen property in the first degree as an

inconsistent verdict.

However, it is clear that each count of an Indictment is to be treated as if it were a separate charge and consistency of verdicts is unnecessary. Dunn v. U.S. 284 U.S. 390 (1932); People v. Pugh, 36 A.D. 2d 845 (2d Dept., 1971), aff'd 29 N.Y. 2d 909 (1972), cert. denied 406 U.S. 921 (1972). Further, the verdict is not repugnant since the two crimes charged did not contain identical elements. People v. Bullis, 30 A.D. 2d 470 (4th Dept., 1968); People v. Blandford, 37 A.D. 2d 1003 (3d Dept., 1971) and People v. Williams, ____A.D. 2d____ 2d Dept., decided April 21, 1975.

(c) As to defendant's contention that the jury panel did not satisfy the requirements of Taylor v. Louisiana, 95 S. Ct. 692 (1975), it is submitted that defendant fails to state sufficient allegations to constitute a question of fact [See People v. Session, 34 N.Y. 2d 254 (1974)] and the bare assertion that only one woman was seated in the jury panel does not indicate that the procedures utilized in Queens County violated the directives of Taylor.

WHEREFORE, the People request that an order, staying execution of judgment pending appeal, not be issued by this Court and if such an order is granted that bail be set in the amount of $3500.

Dated: Kew Gardens, New York
May 27, 1975

JOSEPH DEFELICE